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IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1998

FRANCIS H. WOODWARD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Frank Woodward was a state legislator who co-chaired the Massachusetts legislature's Joint Insurance Committee. William Sawyer was an insurance industry lobbyist who frequently lobbied that Committee. Woodward and Sawyer, and their wives and families, were also very close personal friends. Sawyer (through his employer) paid for $8,700 worth of meals, rounds of golf, and entertainment he shared with Woodward (and often their wives) over an eight year period. The questions presented are:

1. Whether Woodward could be convicted of theft of honest services, in violation of 18 U.S.C. §1346, without evidence that in exchange for these expenditures he agreed to perform specific official acts favorable to Sawyer's company which he would not have performed but for the expenditures.

2. Whether the Due Process Clause of the Fourteenth Amendment, overbreadth principles of the First Amendment, and the language of 18 U.S.C. §1346 permit Woodward's conviction for honest services fraud even when he had a dual intent in receiving the gratuities, and the unlawful portion of that intent was de minimis.

3. Whether a telephone call to reserve a hotel room for Sawyer at a conference during which Sawyer would subsequently pay for some meals and entertainment for Woodward, and the mailing of a credit card invoice to Sawyer several weeks after the conference itemizing these expenditures, were mere jurisdictional hooks to procure federal jurisdiction under 18 U.S.C. §§1341 and 1343 for the federal prosecution of state ethics violations.

PARTIES TO THE PROCEEDINGS

The Petitioner, Francis H. Woodward, was a defendant in the district court and an appellee in the First Circuit Court of Appeals, along with plaintiff-appellant the United States of America.

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PETITION FOR WRIT OF CERTIORARI

Petitioner hereby petitions this Court to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 149 F.3d 46. Appendix (App.) 1a. The district court did not issue an opinion.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on July 20, 1998. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant provisions are reproduced at Appendix B. App. 57a.

STATEMENT OF THE CASE

Francis H. Woodward served as a member of the Massachusetts House of Representatives from 1977 until April, 1992. App. 2a. From January, 1985 through January, 1991, Woodward acted as the House Chair of the Joint Committee on Insurance. Id. During Woodward's tenure as the Chairman of the Insurance Committee, John Hancock Mutual Life Insurance Company ("John Hancock") was one of the two largest insurance companies in Massachusetts. Id. John Hancock employed F. William Sawyer as a Senior Legislative Counsel in the Government Relations Department. Id. In that capacity, he was responsible for lobbying the Massachusetts legislature and primarily the Insurance Committee on insurance legislation. App. 3a.

As a result of their respective positions, Woodward and Sawyer maintained a professional relationship throughout Woodward's service in the Massachusetts legislature. App. 8a. In addition, the two maintained a close personal relationship which extended to their families as well. Beginning in the early 1980s,

the Sawyer family typically spent time at the Woodwards' summer home on Cape Cod. App. 9a. In addition, Woodward and Sawyer, along with their wives, routinely traveled together to COIL (Conference of Insurance Legislators) conferences held several times each year, and socialized together there. Id. At trial, Woodward's wife testified that the Sawyers were one of three couples with whom the Woodwards were closest. Id.

The government's case against Woodward contained two prongs - receipt of gratuities from Sawyer and favorable official action toward John Hancock. App. 5a, 8a. With respect to the former, the government focused on expenditures by Sawyer on Woodward for the period from 1984 to 1992. Sawyer paid for these expenditures with a credit card, which he then submitted for reimbursement by John Hancock. App. 6a. The expenditures took several forms, primarily shared meals, golf and entertainment. App. 5a.[1]

Review of Sawyer's expenditures on Woodward reveals a total of $8,740 expended on Woodward by Sawyer from March 28, 1984 to January 23, 1992. Id. Of that total, only $1,827 was expended on Woodward during the statute of limitations period. Id. Within the limitations period only $487.47 was expended on Woodward while he was the House Chair of the Insurance Committee. Id. The remaining $1,340 was expended by Sawyer after Woodward had been purged from leadership and was a rank and file member of the Transportation Committee, when he had

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[1] Included in the latter category was a trip for Woodward and his wife to the 1986 Super Bowl in New Orleans. This expenditure was by far the largest by Sawyer ($1,809, or approximately 21% of the total expenditures for the eight-year period) and although it occurred well before the statute of limitations and prior to the passage of 18 U.S.C. §1346, evidence of the trip was admitted at trial to prove Woodward's intent and state of mind with respect to the conspiracy count.

lost all potential utility to the life insurance industry and John Hancock in particular. Id.

The second prong of the government's case concerned official action by Woodward favorable to John Hancock. Rather than attempt to link gratuities received by Woodward to a specific official act, the government sought only to show a more generalized pattern of gratuities in return for ongoing favorable official action.

The Insurance Committee considered approximately three hundred bills per year during Woodward's tenure as chair. App. 3a. Once assigned, the Committee held public hearings on the bills after which committee members voted to recommend the bills favorably or unfavorably. App. 4a. In addition to his responsibilities as a committee member, as the House Chair of the Insurance Committee, Woodward (along with his Senate co-chair) was responsible for staffing the committee, supervising staff, and scheduling public hearings and executive sessions. Id. Furthermore, once the Committee voted to recommend a bill favorably, the chair of the committee was usually charged with "carrying" the bill throughout the legislative process.[2] Id.

In support of its contention that Woodward was influenced in the performance of his official duties, the government relied upon Woodward's legislative action in connection with several bills supported by John Hancock. Specifically, the government adduced evidence that Woodward consistently opposed a bill which would

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[2] The parties disputed whether "carrying" legislation meant active involvement in promoting a bill's passage or merely ministerial tasks. The circuit court concluded that the jury could fairly infer that the term meant active involvement. App. 4a n. 1.

have required mandatory discounts on life insurance for nonsmokers. App. 25a. The bill was opposed by the industry, including John Hancock, and eventually received a favorable recommendation from the Insurance Committee based on the support it received from Woodward's co-chair. Id. Despite this fact, the bill was ultimately defeated when Woodward led the opposition to it in debate before the full House of Representatives. Id. In addition, the government also pointed to Woodward's support of other legislation supported by the industry, including bills allowing life insurance companies to change the way in which they valued real estate assets to adjust pension funds to provide financial services and to be flexible in corporate governance and finance. Id.

As evidence tending to refute this theory, Woodward pointed to thirty-one specific documented instances where he took positions on legislation which were adverse to John Hancock's interests. App. 26a. Most notable among these instances was Woodward's support of H6394, a bill introduced in 1990 which would have effectively deprived John Hancock of the state employee health insurance contract, thereby creating a potential loss to John Hancock of some $200 million. In addition, Woodward presented evidence showing his consistent support of so-called "mandated benefit" bills which required the provision of certain services by insurers and therefore were steadfastly opposed by the industry.

On July 27, 1995, a grand jury sitting in the District of Massachusetts returned a 28 count indictment charging Woodward with violations of 18 U.S.C. §§371, 1341, 1343, 1346 and 1952. App. 59a-77a. When reduced to its essence, the indictment alleged Woodward used the mails and wires in furtherance of a scheme to defraud the citizens of the Commonwealth of Massachusetts of their

right to his honest services as an elected state representative. The indictment further charged that Woodward used the facilities of interstate commerce in aid of his efforts to commit bribery.[3]

After a nine-day trial, the jury acquitted Woodward of 23 of the 28 counts charged in the indictment. The four substantive counts of which Woodward was convicted stemmed from the November, 1990 COIL conference in Orlando, Florida. The district court subsequently entered judgment of acquittal on one of the Travel Act counts prior to sentencing Woodward to six months in a community treatment center and ordering him to pay a $5,000 fine.

On appeal, the First Circuit Court of Appeals affirmed Woodward's convictions. The circuit court rejected Woodward's contention that the evidence was insufficient to establish his guilt beyond a reasonable doubt on the counts of convictions. Furthermore, the circuit court found no reversible error in the district court's jury instructions or evidentiary rulings. Woodward subsequently sought and obtained a stay of the circuit court mandate and filed this petition.

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[3] The majority of the Travel Act counts simply recycled the mailings and wirings alleged in the honest services counts for the purpose of establishing a jurisdictional predicate.

THE CIRCUIT COURT'S EXPANSION OF HONEST SERVICES FRAUD TO PERMIT CONVICTION WITHOUT PROOF THAT THE DEFENDANT PERFORMED A SPECIFIC OFFICIAL ACT IN EXCHANGE FOR A GRATUITY, OR THAT HE WOULD NOT HAVE PERFORMED THE ACT BUT FOR THE GRATUITY, CONFLICTS WITH THE LANGUAGE AND INTENT OF 18 U.S.C. §1346, AND WITH OTHER CIRCUIT COURT OF APPEALS DECISIONS

In the decision below, and its predecessor, U.S. v. Sawyer, 85 F.3d 713 (1st Cir. 1996),[4] the First Circuit Court of Appeals acknowledged that it had embarked on an expansion of the traditional scope of honest services fraud by a public official (or lobbyist) under 18 U.S.C. §1346. Prior to Sawyer, honest services fraud involving public officials was typically confined to "quid pro quo bribery or blatant conflict of interest," Sawyer, 85 F.3d at 741, as quoted in Woodward, App. 13a. More specifically, these involved: "(1) bribery, where a legislator was paid for a particular decision or action, or (2) failure to disclose a conflict of interest, resulting in personal gain." App. 11a (emphasis added).

Sawyer, as reiterated in Woodward, "expanded category (1) from quid pro quo bribery, to include a more generalized pattern of gratuities to coax 'ongoing favorable official action,'" id.

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[4] The First Circuit characterized the instant case as "the sequel" to Sawyer. App. 2a.

quoting Sawyer, 85 F.3d at 730.[5] Thus, Woodward's acceptance of Sawyer's gratuities was not deemed for the purpose of influencing specific legislative action on behalf of John Hancock, Sawyer's employer. App. 12a; Sawyer, 85 F.3d at 730. Rather, the jury could have inferred that Woodward knew "that the gratuities would continue as long as he voted favorably to Hancock's interests ..." App. 19a; see also Sawyer, 85 F.3d at 730 (Sawyer "may have intended the legislators generally to treat preferentially Hancock's interests, knowing that the free meals, entertainment, and golf would continue so long as favorable action were, at some point, taken").

The circuit court acknowledged that its Sawyer-Woodward rulings expanded the traditional scope of honest services fraud by a public official. It conceded that "prosecutions on facts like these have not generally been brought," Sawyer, 85 F.3d at 741, and that it was a "novel" prosecution. Id. at 742. Furthermore, it viewed the government's theory as "an expansive reading of the federal statutes", and expressed some concern "about the lack of fair warning of a prosecution such as this one ..." Id.

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[5] The First Circuit effected an expansion of the second category as well, without acknowledging that it was doing so. The cases previously involving a failure to disclose a conflict of interest had typically involved a public official involved in official conduct with respect to a particular matter in which he, or an associate, had a hidden interest, and thus stood to profit. See, e.g., U.S. v. Paradies, 98 F.3d 1266, 1275 (11th Cir. 1996) (city council member failed to disclose ownership interest in company receiving financial benefit of his actions), cert. denied, 117 S.Ct. 2483 (1997); U.S. v. Silvano, 812 F.2d 754, 759 (1st Cir. 1987) (city budget director failed to disclose that friend had significant interest in firm awarded city insurance contract); U.S. v. Keane, 522 F.2d 534, 538 (7th Cir. 1975) (alderman used position to secure preferential treatment for property in which he maintained undisclosed interest).

In endorsing this expansive reading, the circuit court has placed itself at odds with other circuits, which have confined honest services fraud by public officials in a gratuity context to cases in which the official received the gratuity (or bribe) in exchange for his being influenced to take official action on a particular matter of importance to the donor; action which the official would not otherwise have taken. See Appendix D (listing history of honest services cases involving public officials both pre- and post-18 U.S.C. §1346); see also U.S. v. Bloom, 1998 U.S. App. LEXIS 15988 at *23-24 (7th Cir. July 13, 1998) (holding, in context of scheme to defraud private entity of honest services, "[g]iven the tradition (which verges on constitutional status) against common-law federal crimes, and the rule of lenity . . . it is best to limit the intangible rights approach to the scope it held when the Court decided . . . [U.S. v.] McNally [483 U.S. 350 (1987)]"). With the exception of the cases noted below, no other case has been located in which the official's receipt of a gratuity, or other item of value, was not linked to particular official action which the donor wished him to take and which the official would not have taken but for the gratuity.[6]

By permitting the requisite fraudulent intent to be made out by the inference that legislators understood that the free meals and entertainment would not continue unless "favorable official acts were, at some point, taken," Sawyer, 85 F.3d at 730, the circuit court has extended the theft of honest services to previously uncharted territory. This excursion suffers from several

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[6] The only cases which adopt the First Circuit's expansion of the honest services doctrine do so either without supporting authority or in exclusive reliance on Sawyer. See U.S. v. Williams, 1998 U.S. Dist. LEXIS 8352 at *5 (D. D.C. May 29, 1998); U.S. v. Espy, 989 F. Supp. 17, 28 (D. D.C. 1997); U.S. v. Bissell, 954 F. Supp. 841, 862-63 (D. N.J. 1996).

deficiencies which would extend §1346 beyond the scope of its language and underlying intent, without the "clear statement" required by McNally, 483 U.S. at 359-60. These deficiencies, each of which will be addressed in turn, would allow conviction for honest services fraud under §1346 (or for Travel Act offenses under §1952):

1. Without requiring evidence of a direct link (whether by direct or circumstantial evidence) between a particular gratuity and resulting favorable action;

2. Without evidence that the official action taken in consideration for the gratuity related to a specific matter of importance to the donor;

3. Without evidence that the official action favorable to the donor would not have been taken by the official but for his receipt of the gratuity; and

4. By allowing the government to substitute evidence of failure to disclose the conflict of interest for evidence of intent to be influenced to favor the donor.[7]

First, the major change wrought by Woodward and Sawyer is to depart from the line of caselaw requiring "quid pro quo bribery," App. 13a, by which honest services defendants nearly always received a particular item of value in consideration of taking action favorable to the donor (or donor's associate). See, e.g., U.S. v. Evans, 148 F.3d 477, 1998 U.S. App. LEXIS 16957

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[7] Although not framed in these terms before the circuit court, the question of the nature and extent of proof of fraudulent intent necessary for a §1346 conviction was central to Woodward's appellate arguments. The instant argument is thus reasonably related to, and implicit in, the arguments which Woodward advanced on sufficiency of the evidence of fraudulent intent. Brief of Appellant (hereinafter "Br.") 19-25; the proper jury instruction on dual intent (Br. 35-42); the reach of §1346 (Br. 49-50); and void for vagueness (Br. 50).

at *5-6 (5th Cir. July 24, 1998) (state parole officer received bribes of cash and drugs in return for allowing parolee to violate conditions); U.S. v. Lopez-Lukis, 102 F.3d 1164, 1165 (11th Cir. 1997) (member of Board of County Commissioners sold votes to lobbyist and took steps to ensure that majority of Commissioners voted for projects favored by lobbyist); Paradies, 98 F.3d 1275 (11th Cir. 1996) (member of city council received cash payments for votes on issues before committee), The circuit court abandons this link by allowing conviction where a series of ongoing goodwill expenditures ostensibly encouraged generally supportive action by Woodward to ensure his continued receipt of such expenditures. App. 18a-19a.

Second, the traditionally required link is further eroded by not requiring the government to point to specific favorable action performed by Woodward as a result of the expenditures. Typically the official action sought by the donor in consideration for the gratuity is clearly articulated by the donor and understood by the official-recipient. See, e.g., Silvano, 812 F.2d at 755-57. Based on the circuit court's ruling here, however, all the government must show is that the defendant understood the free meals and entertainment would cease unless "favorable acts were, at some point, taken." Sawyer, 85 F.3d at 730 (emphasis added). The haziness of the connection between the acts taken and the gratuities given is accentuated by the permissible distance in time between the two, and the imprecision of the particular favorable acts to be performed.

Third, that haziness is reinforced by the absence of any qualification of the term "favorable acts." Id. Are these legislative acts which Woodward would have taken, on their merits, even if he had not been wined and dined by Sawyer, and which happen to be consistent with Hancock's interests? A theft of honest services

can only be made out in a gratuity case if in exchange for the gratuity, the defendant engages in "biased decision making," Sawyer, 85 F.3d at 724. The bias is made out only if the votes, or other decisions, were motivated or influenced by the gratuities, rather than by other, benign factors.

Finally, Woodward follows Sawyer by stating that the government can demonstrate Woodward's intent to deprive the public of his honest services without any evidence of his being influenced by the gratuities to perform official acts. This is because as an alternative to such evidence, he can be shown to have failed to disclose a conflict of interest, resulting in personal gain. Woodward, App. 17a, 29a.

This formulation is problematic in two respects. First, it allows substitution of failure to disclose a conflict for evidence of the defendant official being "influenced or otherwise improperly affected in the performance of his duties." App. 17a. Without the latter, there can be no honest services fraud, and the failure to disclose is an inadequate substitute for it. See United States v. Rabbitt, 583 F.2d 1014, 1026 (8th Cir. 1978) (finding no deprivation of honest services where state representative introduced friend's firm to public officials responsible for awarding city contracts, where defendant played no role in such awards and did not otherwise fail to fulfill his official duties, and where government cited no standard requiring defendant to disclose his interest in the contracts); United States v. McNeive, 536 F.2d 1245, 1246 (8th Cir. 1976) (finding no deprivation of honest services of city plumbing inspector despite acceptance of unsolicited gratuities, where inspector's administrative duties were non-discretionary and no evidence that gratuities deterred McNeive from conscientiously performing duties). For if a public official fails to disclose a conflict of interest, but never acts on the conflict

by taking biased official action which he would not otherwise have taken, then the failure to disclose is irrelevant and, in and of itself, not enough to constitute a deprivation of honest services.[8]

The second problem with allowing this alternative formulation of intent is that it allows substantial overlap and confusion between two separate and distinct elements of honest services fraud: intent to deprive the public of honest services and intent to deceive. Both Sawyer, 85 F.3d at 725-32, 732-34, and Woodward, App. 17a-29a, 29a-32a, emphasize the distinct nature of these two elements. Yet the circuit court permits their collapse into one. App. 31a- 32a.

To determine the proper scope of §1346 we are guided by the language of the statute, the intent of Congress as gleaned by the legislative history (and the absence therein of any McNally "clear statement"), and the boundaries of honest services fraud which have been drawn by most circuit courts of appeals interpreting it. These guideposts tell us that conduct of a public official in a gratuities or bribery case runs afoul of §1346 only when: (1) the official receives a gratuity; (2) in exchange for receipt of the gratuity the official performs or agrees to perform (3) a specific or particular official act on a matter of importance to the donor; and (4) which the official would not have performed but for his receipt of the gratuity. See Appendix D. In addition, and not by way of substitution, the government must prove the defendant intended to deceive the public, e.g. by concealing or failing to disclose his receipt of gratuities or other conflict of interest.

By straying from these principles, and allowing conviction on a lower standard of honest services fraud, the circuit court has

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[8] It may, however, as in this case, constitute a violation of a state disclosure or reporting requirement. See Mass. G.L. c. 268B, §5.

blurred, perhaps beyond recognition, the line separating benign from fraudulent conduct, and has created grave risks of conviction for the former without proof of the latter. The circuit court's relaxation of the quid pro quo requirement so as to allow conviction despite no evidence of a link between a particular gratuity and a particular action simply encourages both sides to "cherry-pick" isolated actions and invite the jury to guess whether they were or were not motivated by a desire generally to continue receiving benefits.[9] This unfairly puts at risk public officials based on a "scorecard" mentality[10] derived from which side of the industry position their votes or actions fall, without regard to

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[9] Resolution of this issue also implicates the Speech or Debate Clause U.S. Const. Art. I, §6, in the context of a federal legislator. See U.S. v. Brewster, 408 U.S. 501, 527 (1972) (privilege not triggered in bribery prosecution of Senator only because "inquiry into legislative performance [was] not necessary").

[10] The manifest dangers of this "scorecard" mentality are amply illustrated in the instant case. The circuit court pointed to evidence of five specific bills during Woodward's six year tenure as House Chair of the Insurance Committee which were significant to Hancock (or the insurance industry) and which Woodward supported. App. 25a. There was also evidence of 31 bills of significance to Hancock on which Woodward acted contrary to Hancock's interests. App. 26a. Surprisingly, the circuit court "bought" the government's argument that since there were only 31 bills the defense could point to on which Woodward opposed the industry (out of about 600 bills of importance to the industry), that must mean that Woodward supported the industry on the other 569. App. 26a-27a. Why wasn't the point that if the government could only show five bills on which Woodward supported Hancock, then he must have opposed the company on the other 595? In fact, the defense did not make any such "extrapolation" argument becuase it would have been disingenuous to do so. Both sides were simply marshalling those bills on which there was evidence both that they were important to Hancock and that Woodward acted either consistently with or contrary to Hancock's expressed desires on them. There was no evidence one way or the other on any of the remainder of the approximately 600 specific bills of importance to Hancock, and thus to derive any conclusions as to them is speculative at best and intellectually dishonest at worst.

whether they arrived at those positions due to the merits, due to the gratuities, for other reasons, or for a combination thereof.

The question is an important one for this Court to address and resolve not just because of its threat to the legislative process but also because it goes to the heart of traditional honest services fraud. The expansion wrought by the circuit court would broaden greatly the scope of conduct embraced by such fraud. Within the broadened scope would lie conduct which was otherwise benign and honest. Theft of honest services has traditionally connoted dishonesty in the execution of official duties. See Appendix D. Rather than receipt of money, expenditures, or other items of value in exchange for favorable official action, the theory as now articulated by the circuit court would require no such showing of dishonesty, and would invite conviction on the basis of otherwise benign conduct, thus implicating overbreadth concerns.[11]

As the circuit court noted in Sawyer, "[t]he practice of using hospitality, including lavish hospitality, to cultivate business or political relationships is longstanding and pervasive." 85 F.3d at 741, quoted in Woodward, App. 13a. The circuit court has now criminalized conduct which "itself may not be very different, except in degree, from routine cultivation of friendship in a lobbying context," which does not violate federal criminal law. App. 13a; see also Sawyer, 85 F.3d at 741 (noting "the close

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[11] Woodward preserved in the Court of Appeals his position that §1346 was void for vagueness as applied to public officials. See Br. at 49-50. Although he argued void for vagueness rather than overbreadth, both implicate the First Amendment, and the distinction is not meaningful. See, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377, 381 n. 3 (1992) (for purposes of petition for certiorari, claim that ordinance regulated content of speech in violation of First Amendment was "fairly included" in questions whether ordinance was overbroad and void for vagueness in violation of First Amendment); Kolender v. Lawson, 461 U.S. 352, 358 n. 8 (1983) ("[W]e have traditionally viewed vagueness and overbreadth as logically related and similar doctrines.")

relationship between lobbying activities that are lawful from the standpoint of federal law, even if deplorable, and associated or slightly more extreme versions of such conduct that can constitute federal violations").

This newfound distinction between lawful and unlawful gratuities is too blurred to survive constitutional scrutiny. Turning as it does on the lobbyist's intent in paying for meals, golf, and entertainment, and the legislator's intent in receiving them, it simply creates too great a risk that the defendant can be convicted for predominantly lawful conduct, e.g. Woodward's performance of official acts which by happenstance were favorable to Hancock but which were influenced by Woodward's view of the merits and not his receipt of the gratuities. In this context, as interpreted by the circuit court, §1346 offends the Constitution because it is overbroad, i.e. its reach extends to, and it permits conviction for, lawful as well as unlawful activity. See Aptheker v. Secretary of State, 378 U.S. 500, 505 (1964) (statute prohibiting member of Communist Party from obtaining passport struck down as overbroad; Act infringed upon constitutionally protected right to travel for legitimate, as well as illegitimate, purposes). Moreover, such a blurred distinction between lawful and unlawful conduct also potentially deprives the defendant of liberty without due process of law, in violation of the Due Process Clause. See Kolender, 461 U.S. at 361-62 (law requiring loiterer to give "credible and reliable" information to police officer deemed standardless and encouraged arbitrary enforcement); Papachristou v. City of Jacksonville, 405 U.S. 156, 164-65 (1972) (statute outlawing "loafing" and "wandering or strolling about from place to place" cast too wide a net to put defendant on notice of prohibited conduct).

THE CIRCUIRT COURT'S ENDORSEMENT OF JURY INSTRUCTIONS ALLOWING CONVICTION FOR DE MINIMUS UNLAWFUL INTENT THREATENS THE CRIMINALIZATION OF LAWFUL CONDUCT IN VIOLATION OF THE CONSTITUTION

The circuit court's antidote to the blurred distinction between lawful legislator-lobbyist conduct, and honest services fraud, is a jury instruction which purports to carve out the distinction for jurors in meaningful terms. In Sawyer the circuit court stated that "where, as here, the line between the merely unattractive and actually criminal conduct is blurred, the court must take pains to explain the difference to the jury." Sawyer, 85 F.3d at 741. Taking such pains means:

> the jury needs to be told specifically that the defendant has not violated the bribery component of the Travel Act (or committed honest services fraud) if his intent was limited to the cultivation of business or political friendship. Only if instead, or in addition, there is an intent to cause the recipient to alter his official acts may the jury find a theft of honest services or the bribery predicate of the Travel Act.

Id.

The relevant instruction in Woodward's trial was as follows:

> You may not find that the defendant violated either set of federal laws which I have described to you if his receipt of the expenditures was solely part of a routine cultivation of a business or political friendship rather than an intent on his part to be influenced in his official legislative duties. If instead or in addition, there is an intent on the

> defendant's part to be influenced in his official legislative duties, then you may find a violation of either set of federal laws. If there is both the intent to cultivate a business and political friendship and the intent to be influenced in official legislative duties, then you may find a violation of the federal laws.

App. 51a (emphasis added).

The difficulty with this instruction, and the mandate of Sawyer and Woodward, is that the instruction does not properly account for the allocation of lawful versus unlawful intent in a dual intent case. As the circuit court noted in Woodward, "[r]elationships among human beings, especially among lobbyists and elected officials, will frequently not follow a bright-line pattern, falling on one side or the other of some magical wall dividing friendship from attempts at unlawful influence." App. 48a. In light of this common mix of lawful and unlawful intent in honest services (and other) cases, it is all the more important to ensure that defendants are only convicted with the necessary quantum of unlawful intent in the mix to suffice for conviction, and that a jury instruction is crafted which delineates clearly that standard.

This the circuit court has failed to do, in both Sawyer and Woodward. In Sawyer, the court dealt only obliquely with the dual intent issue. 85 F.3d at 741. In Woodward, confronted with a specific request for a dual intent instruction, the district court expanded somewhat on Sawyer's proposed instruction by adding a final sentence dealing explicitly with the dual intent issue.

That instruction was upheld by the circuit court, App. 45a-53a, in a two-part analysis. First the court disagreed with Woodward's appellate contention that in a dual intent case the illegal portion of the mix needs to be more than minor, incidental,

or de minimus. App. 52a. The court stated that even assuming Woodward was correct and that a conviction should not stand if the illegal intent is de minimus or insignificant, this did not mean the district court erred in failing to give such an instruction. Id. While "[t]he law may require a certain degree of illegal intent in order to convict," the court said, it does not follow that an explicit instruction to that effect was required. Id. Even if the instructions "were not technically adequate" in the absence of such instruction, the court found Woodward not to be prejudiced by the error because in the court's view evidence showed he had more than a de minimus degree of intent to defraud the public of his honest services. Id.[12]

The circuit court's Woodward and Sawyer opinions leave a yawning jurisprudential gap. This is not a question of whether a jury instruction is "technically adequate." It is, instead, a question of precisely how to instruct a jury in a dual intent case so that it does not convict when the intent is overwhelmingly benign. Such a conviction would trample on due process rights effectively by allowing conviction without a necessary element of fraudulent intent. See Thompson v. City of Louisville, 362 U.S. 199, 204 (1960) (no evidentiary support for conviction). While the Woodward instruction upheld by the circuit court would require some quantum of illegal intent, that portion of the mix could be so nominal as to be the functional equivalent of no evidence on that element. In the context of this case, it could effectively criminalize the status of being a legislator and having a personal relationship with a lobbyist.

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[12] In our view, this should be a matter for a properly instructed jury to determine.

Left unaddressed by the circuit court are several fundamental questions which must be answered to ensure that any honest services conviction comports with the language of §1346, the First Amendment, and the due process clause. First, may a defendant be convicted of an intent offense when his conduct is carried out with a predominantly lawful motive, and the unlawful component of the mix is but minor or incidental? We believe he may not, and that such a conviction would offend the Due Process clause of the Fourteenth Amendment and principles of overbreadth and void for vagueness. Secondly, where does the line get drawn so as constitutionally to permit conviction in honest service fraud and other commonly dual intent cases? Third, how does that line get communicated to juries in a clear and precise fashion so as to ensure constitutional discharge of their fact-finding function?

These questions are fundamental to the resolution of the proliferating number of honest service and other cases in which defendants commonly engage in conduct with a dual intent. Because these important questions have not squarely been addressed by this Court,[13] but should be, Supreme Court Rule 10(c), this Court should grant the Petition.

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[13] While the court in U.S. v. Anderson, 417 U.S. 211, 226 (1974), held that a conspiracy may be made out where the purpose to violate federal law is secondary in nature, that decision left unanswered the precise issue raised here.

THE CIRCUIT COURT'S AFFIRMANCE OF THE MAIL AND WIRE FRAUD COUNTS CONTRAVENES ESTABLISHED PRECEDENT OF THIS COURT AND VALIDATES THE GOVERNMENT'S ATTEMPT TO CONTRIVE FEDERAL JURISDICTION OVER ISSUES PROPERLY RESOLVED AT THE STATE LEVEL

A. Introduction

At its core, this case presented evidence of an alleged scheme by a member of the state legislature, elected in a state election, to violate three provisions of a state statutory scheme enforced civilly by the State Ethics Commission and (where criminal penalties attach) by the state Attorney General.[14] By the simple expedient of appending an interstate telephone call to Count 9, and a mailing to Count 4, the government elevated to the federal criminal level what would have been a simple, clearcut enforcement action by the State Ethics Commission had the Commission chosen to proceed with it, as the Commission did on numerous other instances involving Sawyer's good will

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[14] Mass. G.L. c. 268A, §3 punishes by criminal penalty or civil fine the solictation or acceptance of items of substantial value for or because of an official act. Mass. G.L. c. 268B, §6 creates a civil penalty for the solitication or acceptance of gifts in aggregate of one hundred dollars in a calendar year. Mass. G.L. c. 268B, §5 also imposes a civil penalty for failure of public officials to file Statements of Financial Interest listing gifts received from any person with a direct interest in legislation. The Massachusetts State Ethics Commission acts as the primary civil enforcement agency for all violations of c. 268A and c. 268B. Mass. G.L. c. 268B, §3(i). The Commission also has the power to refer alleged violations to the Massachusetts Attorney General's Office for criminal prosecution. Mass. G.L. c. 268B, §4.

entertainment of legislators.[15] As will be shown, the telephone call and mailing are too attenuated to have been for the purpose of "executing" the scheme, or to have "furthered" it, and thus served as pretexts to invoke federal jurisdiction over alleged offenses which were clearly of a state character. By ruling to the contrary, and viewing this wiring and mailing as in furtherance of the scheme, the circuit court put itself in conflict with well-defined rulings of this Court. Supreme Court Rule 10(a).

B. Wire Fraud (Count 9)

The interstate wire transmission supporting Court 9 was a telephone call from Sawyer's office to a Lake Buena Vista, Florida hotel three days before commencement of a COIL conference in that city. It is conceded that the jury could reasonably have inferred that the call was made to reserve a hotel room for Sawyer during that conference. What is not conceded is that the purpose of that call was to execute Woodward's purported scheme to defraud the public of its right to his honest services as a legislator.

The circuit court concludes, App. 49a, that the call was made in furtherance of that scheme because:

> Sawyer would not have been able to give Woodward the illegal gratuities during the COIL conference if Sawyer did not have a hotel room in which to stay for the four days of the conference. The call in question secured that room, and thus played an essential role in the scheme.

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[15] None of these enforcement actions by the State Ethics Commission against other legislators were accompanied by criminal charges, either state or federal, against the recipients of Sawyer's largesse.

The circuit court's rationale is specious, and reflects the degree to which circuit courts need guidance and clarity from this Court on the "in furtherance" test. Sawyer would indeed have been able to give Woodward the illegal gratuities during the COIL conference even if Sawyer did not have a hotel room in which to stay at the site of the conference. The court itself suggested such a way by pointing to evidence that Sawyer had left another COIL conference early, "but left his credit card to be used for paying Woodward's golf and meal expenses during the remainder of the conference." App. 19a. Consistent with the court's interpretation of the evidence,[16] by giving Woodward his credit card, Sawyer could dispense altogether with his presence at the conference, and with the need for a hotel room.

C. Mailing (Count 4)

The mailing supporting Count 4 was the credit card bill sent by Citibank Visa to Sawyer which included bills for Sawyer's charging of certain gratuities for Woodward 3-4 weeks earlier at another COIL conference. Woodward argued on appeal that because Woodward had already received the gratuities, the scheme had reached fruition, and the credit card bills could do nothing further to execute the scheme, *citing* Parr v. U.S., 363 U.S. 370, 393 (1960); Kann v. U.S., 323 U.S. 88, 94 (1944); and U.S. v. Maze, 414 U.S. 395, 402 (1974).

The circuit court rejected the argument and ruled that the mailing of the credit card bill was in furtherance of the ongoing

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[16] Evidence showed that while Sawyer did have to leave this conference early, his wife remained at the conference. It is more reasonable to infer that she used her husband's credit card to continue to socialize with her close friends the Woodwards than that Sawyer gave it to Woodward to use.

scheme by which Sawyer continued, for years, to give gratuities to Woodward by charging entertainment on his credit card. App. 36a.

> Every month, Visa would use the mails to bill Sawyer for his charges; if Sawyer did not pay those bills, his credit line would have been terminated and the gratuities could not have continued as Woodward and Sawyer expected. It was thus a necessary part of the ongoing scheme that Sawyer pay his bill after receiving it in the mail.

Id. (citation omitted).

The reasoning is both specious and in conflict with Maze, Parr, and Kann. First, whether or not Sawyer paid the bills was unrelated to Citibank's mailing of them. Those were routine, monthly mailings, the existence of which (as Citibank would readily attest) in no way assured Sawyer's payment of them which the Court depicted as a prerequisite to continuation of the scheme.

This depiction, too, is fundamentally unsound. If Sawyer chose not to pay the credit card payments, it likely would have eventually resulted in the termination of that particular credit card. But that would not have doomed the scheme, which could have continued unabated in many alternative ways: other credit cards of Sawyer's, a Hancock credit card, traveler's checks, cash, other Hancock employees. To suggest that the mailing of the bill to Sawyer furthered the scheme because the scheme would have come to an abrupt halt if Sawyer did not pay those bills is a great stretch beyond the Court's "fruition of the scheme" rule. Conflicting as

it does with these rulings,[17] and illustrating the potential abuse of mailings and wirings contrived to procure federal criminal jurisdiction over a state regulatory scheme, this ruling is ripe for review by this Court. See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 119 (1973).

D. Conclusion

This case illustrates the tenuousness of the link between an interstate wiring (or a mailing) and the underlying fraudulent scheme, as currently interpreted by many circuit courts. If that link is to have any vitality, it remains for this Court to narrow the gap which currently divides mailings/wirings from the scheme, and to ensure that they are not strangers to one another. By making the jurisdictional requisite truly further the scheme (rather than be a barely relevant appendage to it), this Court can curb the practice of federalizing state and local offenses which should properly be enforced by state agencies armed with state statutes.

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[17] On this issue, the circuit court's decision is in conflict with Evans, 148 F.3d 477, 1998 U.S.App. LEXIS 16957 (5th Cir., July 24, 1998) (mailing of travel vouchers insufficient to support mail fraud conviction where scheme had reached fruition prior to mailings; use of mail fraud statute constituted improper attempt to manufacture federal jurisdiction over state crime.)

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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September 16, 1998

Supreme Court, U.S.
FILED

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No. 98-

IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1998

FRANCIS H. WOODWARD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

APPENDIX

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APPENDIX A
UNITED STATES COURT OF APPEALS
For the First Circuit

No. 97-1429

UNITED STATES,

Appellee,

v.

FRANCIS H. WOODWARD,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
(Hon. Douglas P. Woodlock, U.S. District Judge)

Before
Boudin, Circuit Judge
Bownes and Cyr, Senior Circuit Judges.

Bruce A. Singal, with whom William C. Athanas, and Donoghue, Barrett & Singal, P.C., were on brief for appellant.

John M. Griffin, Assistant United States Attorney, with whom Mark W. Pearlstein, Acting United States Attorney, was on brief for
appellee.

July 20, 1998

BOWNES, Senior Circuit Judge. This case is the sequel to United States v. Sawyer, 85 F.3d 713 (1st Cir. 1996), as we discuss in detail infra. Appellant Francis H. Woodward appeals his four-count conviction for mail and wire fraud, 18 U.S.C. §§ 1341, 1343; interstate travel to commit bribery, 18 U.S.C. § 1952 (the "Travel Act"); and conspiracy to commit those offenses, 18 U.S.C. § 371. The charges stem from his acceptance of illegal gratuities from William Sawyer and others, with the intent of depriving Woodward's constituents of his honest services as a legislator. In this appeal, Woodward claims that the evidence was insufficient to establish his guilt beyond a reasonable doubt on any of the four counts. He also argues that the district court erred in certain evidentiary rulings and in its jury instructions. We affirm.

I

Facts

When reviewing an appeal from a conviction, we view the facts in the light most favorable to the verdict. United States v. Gonzalez-Maldonado, 115 F.3d 9, 12 (1st Cir. 1997); Sawyer, 85 F.3d at 731. Francis H. Woodward was first elected to the Massachusetts House of Representatives in 1977. He was assigned to the Joint Committee on Insurance ("Insurance Committee"), and served as the Committee's House Chair from January, 1985 through January 19, 1991. Beginning January 20, 1991 and continuing through April 1992 when he resigned from the legislature, Woodward was assigned to the Transportation Committee, which had no jurisdiction over insurance matters.

During the relevant time period, John Hancock Mutual Life Insurance Company ("Hancock") was one of the two largest

life insurance companies in Massachusetts, and one of the ten largest in the entire United States. Because Hancock is domiciled in Massachusetts and is regulated primarily at the state level, Massachusetts' laws and regulations have a major impact on Hancock, affecting such issues as the corporation's organization and funding.

William Sawyer was the senior legislative counsel in Hancock's Government Relations Department. He was responsible for lobbying the Massachusetts legislature on behalf of bills favored by Hancock and the industry, and against those bills they opposed. He actively lobbied the Insurance Committee.

Hancock was also a member of an industry trade association known as the Life Insurance Association of Massachusetts ("LIAM"). LIAM also employed lobbyists who worked on Massachusetts legislation, in coordination with the lobbyists of its member companies. Sawyer was an active participant in LIAM as well.

Bills filed in the Massachusetts legislature were assigned to committee by subject matter. The Insurance Committee, comprising eleven representatives and six senators, was one of the principal legislative committees to which legislation of interest to Hancock and LIAM was assigned. From 1985 through 1990, the Insurance Committee received, on average, three hundred bills a year, one hundred of which affected the life insurance industry. Of those bills, the industry was interested in passing an average of only five per year; it opposed the rest.

The committee's procedures were, in general, as follows. First, public hearings were held on the bills. Following such hearings, the members of the committee voted on the bills in executive sessions that were open to the public. If the bill

received a favorable recommendation in the committee's executive session, it was reported out favorably for further action on the floor of either the House or the Senate. If it received an unfavorable recommendation or a study order in the committee's executive session vote, then in all likelihood the bill would not pass in that session.

The Insurance Committee was co-chaired by one House and one Senate member. The co-chairs, Woodward and his Senate co-chair, directed the activities of the committee, supervising the committee staff and scheduling all public hearings, executive sessions, and meetings. As co-chair, Woodward had the authority to assign bills to the hearing calendar and subsequent executive sessions, and to take other action that would help to advance bills through the committee (or he could choose not to take such action). Woodward also had the authority to affect the disposition of a bill, including the ability to "carry"[1] a bill through the legislative process or to send it to "study," which effectively shelved it.

As one of the four most active lobbyists on behalf of domestic life insurance companies, Sawyer was frequently present at Insurance Committee meetings. He saw Woodward two or three times a week, and was the lobbyist who met most often with Woodward. After Woodward was removed from the Insurance Committee in January 1991, Sawyer continued to appear at committee meetings and to meet with Woodward's

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[1] The parties dispute whether "carrying" means merely signing paperwork, or whether it means advocating or leading the debate for the bill. As we discuss infra at 27-28, accepting the facts in the light most favorable to the verdict, "carrying" implies active involvement rather than merely ministerial paperwork.

successor as House Chair with the same frequency as he had before.

At the heart of the government's case was the evidence of Sawyer's expenditures on Woodward for shared meals and entertainment. From 1984 through 1992, Woodward accepted in excess of $9,000 in gratuities from Hancock and LIAM through their lobbyists Sawyer and William F. Carroll, the president of LIAM. Hancock provided the majority of this largesse, at least $8,740 in meals, rounds of golf, and other entertainment.

The government introduced evidence showing that, from March 28, 1984 through January 23, 1992, Sawyer expended $8,740 on behalf of Woodward. Of that total, $1,827 was expended after the statute of limitations period began, i.e. after July 27, 1990. One thousand three hundred forty dollars ($1,340) of the total expenditures occurred after January 19, 1991, when Woodward was removed from the Insurance Committee.[2] Sawyer's expenditures consisted of (1) shared meals and entertainment at conferences, generally once or twice a year; (2) miscellaneous meals and rounds of golf each year in Massachusetts; (3) a dinner at the annual Fourth of July social gathering on Cape Cod; and (4) a trip in January 1986 to the Super Bowl in New Orleans. Expenditures from categories (1) and (2) are the subject of this appeal on the sufficiency issue. The jury acquitted Woodward as to category (3) expenditures.

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[2] Woodward argues, as he did at trial, that expenditures occurring after that date are irrelevant to the charges against him because they "came after any potential utility of Woodward to the life insurance industry had ended." The jury acquitted him of all substantive charges stemming from gratuities received after the end of 1990.

Evidence relating to the Super Bowl was not the subject of the indictment, but was admitted, over Woodward's objection, to show the nature of the conspiracy and for its bearing on intent; Woodward appeals the admission of that evidence.

The National Conference of Insurance Legislators (COIL) is a national association of state legislators involved in insurance matters. Every year the organization sponsored one or more conferences for legislators, at various sites around the country, where educational presentations were made concerning insurance matters. Woodward attended many COIL conferences, as did other legislators from Massachusetts and elsewhere. Legislators' travel and hotel expenses were paid from a legislative account or campaign funds but not by the insurance industry. Woodward and Sawyer frequently played golf at exclusive clubs near the conference site, and Sawyer generally paid the costs of the golf. Sawyer used his corporate credit card to pay for business-related expenses. He submitted an expense account statement with receipts, and Hancock reimbursed Sawyer for such expenses. In addition, Sawyer paid for a number of dinners at local restaurants that would be attended by legislators such as Woodward who were attending the conferences. At times, William Carroll of LIAM would pay for the dinners. Sawyer/Hancock also paid for Woodward's entertainment while at these conferences, such as tickets for the Grand Ole Opry when the conference was in Nashville.

In addition to the COIL conference expenditures, Sawyer paid for Woodward's meals at expensive restaurants, as early as 1984, when Woodward was in the Legislature but before Woodward served as co-chair of the Insurance Committee. This practice continued throughout the years Woodward remained in

the House, with higher amounts generally in the years he was committee chair. Sawyer also paid for an average of three to five golf outings with Woodward each year at various locations in Massachusetts. These were principally at Sawyer's private golf club, the Woodland Golf Club. Hancock also paid for other forms of entertainment, including boat rentals and tickets to tourist attractions such as Busch Gardens.

The government introduced into evidence a chart showing the amount of annual gratuities accepted by Woodward. The pattern formed by these amounts is noteworthy. In 1984 and 1985, before Woodward became chair of the Committee and for the first year afterward, Woodward accepted gratuities in the range of $200-300 from Sawyer/Hancock. In 1986 there was a marked increase to $2,527, including over $1,800 to cover the air fare, hotel, and tickets (for him and his wife) to attend the Super Bowl in New Orleans In 1987-91, Woodward received gratuities in the amount of $1,547, $1,093, $513,[3] $1,230, and $1,324. Woodward served as committee chair during all but the last of these years. During his last four months in the legislature, January through April 1992, he received only $16,

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[3] The evidence relating to 1989 appears to underrepresent the actual amount of gratuities received in that year. The numerical evidence in the chart came from Sawyer's expense accounts submitted to Hancock for reimbursement. For years other than 1989, if Woodward participated in a particular event, then Sawyer's expenditure on that event was divided among the number of participants in order to calculate, as closely as possible, the share received by Woodward. In 1989, for a conference on Amelia Island, Sawyer's records do not reflect which legislators participated in which events. Therefore it was not clear what share each individual legislator received of the $5,282 of Sawyer's total expenses for the conference. Thus, although the records reflect that Woodward did share in the total expenditures, the calculation of his annual gratuities for 1989 does not include Woodward's share of the Amelia Island expenses.

and his gratuities dropped to $0 after he resigned from office in April. After Woodward was replaced as committee chair by Rep. Francis Mara, Sawyer began wining and dining Mara in the same manner as he had Woodward. Sawyer, 85 F.3d at 721.

In addition to Sawyer's payments on behalf of Woodward, LIAM lobbyists also paid for some of Woodward's meals during the period of the charged conspiracy (1984-92). These amounted to $444.

Woodward's official actions, for the most part, conformed with the way Sawyer and Hancock wanted the recipient of their gratuities to conduct himself. Sawyer was the lobbyist with whom Woodward met the most, according to Robert J. Smith, the research director for the Insurance Committee. They met approximately three times a week when the legislature was in session. And Woodward repeatedly acted on behalf of Hancock and the life insurance industry in his capacity as co-chair of the Committee.

According to Smith, Woodward was the most pro-life-insurance-industry chair of the Insurance Committee during Smith's tenure, 1985-95 (which included six other House and Senate chairs) Woodward actively supported the industry's position on most bills of importance to the industry.

As his defense to the charge that he engaged in illegal theft of honest services, Woodward presented evidence that Sawyer's expenditures on his behalf were based not on bribery but on their "close" friendship. In addition to their business relationship, Woodward and Sawyer maintained a personal relationship. They met in the late 1970s, which is the time Woodward began serving on the Insurance Committee. The two families socialized together even before Woodward assumed the

chair of the Committee in 1984. The two couples drove together to a conference in New York in 1980, and the Sawyers and their children visited the Woodwards at the latter's house on Cape Cod as early as 1982. Beginning in about 1984, the Sawyers would traditionally stay at the Woodwards' house on the Cape for an annual Fourth of July weekend gathering. The two families also shared other times, including family celebrations and tragedies. Mrs. Woodward testified that the Sawyers were one of three couples with whom the Woodwards were the closest.

The jury convicted Woodward of four[4] (of the twenty-eight) charges against him: one count each of mail and wire fraud, one count of interstate travel to commit bribery, and one count of conspiracy to commit the foregoing three offenses.

II

Requisite Intent Under Mail and Wire Fraud Statutes

To support a conviction for mail or wire fraud, the government must prove beyond a reasonable doubt: "(1) the defendant's knowing and willing participation in a scheme or artifice to defraud with the specific intent to defraud, and (2) the use of the mails or interstate wire communications in furtherance of the scheme." Sawyer, 85 F.3d at 723; see 18 U.S.C. §§ 1341, 1343.[5] "[T]he term 'scheme or artifice to defraud'

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[4] To be more precise, the jury convicted him of five charges, but the district court dismissed one of them as multiplicitous.

[5] In relevant part, 18 U.S.C. §§ 1341 and 1343 provide:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . [uses the mails or wires, or causes their use] for the purpose of

includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346; see Sawyer, 85 F.3d at 723-24.

The government charged that Woodward engaged in a scheme to deprive the Commonwealth of Massachusetts and its citizens (collectively, "the public" or "citizenry") of their right to his honest services as a state legislator performed free from deceit, fraud, dishonesty, conflict of interest, and self-enrichment. In addition to this general duty of honest services, the government charged that Woodward had a specific duty to abide by Massachusetts reporting requirements. With regard to the scheme to defraud, the government charged, inter alia, that Woodward accepted, from individuals (including Sawyer) representing Hancock and LIAM, golf, meals, tickets, and other entertainment and benefits, in violation of Massachusetts law; that Woodward filed false Statements of Financial Interest ("SF1") under oath, in which he unlawfully failed to report to the State Ethics Commission his receipt of the gratuities; that Sawyer on behalf of Hancock and LIAM was given greater access to the Insurance Committee and to Woodward as House Chair than was available generally to the citizenry; and that, from 1984 through 1990, Woodward repeatedly performed official acts on behalf of Hancock and LIAM. The government further charged that Woodward used the mails and interstate telephone wires in furtherance of the scheme, in violation of 18 U.S.C. §§ 1341 and 1343.

In Sawyer, we discussed mail and wire fraud in connection with theft of honest services in a closely analogous

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executing such scheme or artifice . . [shall be punished]

situation where the same facts formed the backdrop for the case. We particularly highlighted the intent required to support a conviction; intent is also a major issue in the present case. But as Woodward stresses, his situation - as the legislator - is not exactly identical to that of Sawyer as the lobbyist. We will, therefore, summarize our analysis in Sawyer, insofar as is applicable here.

We explained that, prior to Sawyer, honest services fraud had typically been found in two types of circumstances: (1) bribery, where a legislator was paid for a particular decision or action, or (2) failure to disclose a conflict of interest, resulting in personal gain. 85 F.3d at 724. As to the latter, we noted that "[a] public official has an affirmative duty to disclose material information to the public employer. When an official fails to disclose a personal interest in a matter over which she has decision-making power, the public is deprived of its right either to disinterested decision making itself or, as the case may be, to full disclosure as to the official's potential motivation." Id. (citing United States v. Silvano, 812 F.2d 754, 759 (1st Cir. 1987)). "Thus, undisclosed, biased decision making for personal gain, whether or not tangible loss to the public is shown, constitutes a deprivation of honest services." Id. The Sawyer case expanded category (1) from quid pro quo bribery, to include a more generalized pattern of gratuities to coax "ongoing favorable official action." Id. at 730; see infra.

"The broad scope of the mail fraud statute, however, does not encompass every instance of official misconduct," even of "reprehensible misconduct," "that results in the official's personal gain." Sawyer, 85 F.3d at 725. The government must

prove that the defendant intended to deprive the public of its right to the honest services of its legislators. Id. at 725, 730.[6]

> This intent could be shown in a number of ways. For example, a bribery-like, corrupt intent to influence official action necessarily is an intent to deprive the public of an official's honest services. A person might not, however, give an unlawful gratuity with the intent to effect a specific quid pro quo. Rather, as the government contends here, a person with continuing and long-term interests before an official might engage in a pattern of repeated, intentional gratuity offenses in order to coax ongoing favorable official action in derogation of the public's right to impartial official services.

Sawyer, 85 F.3d at 730 (noting that "[s]uch conduct would be akin to (although not a classic case of) the conflict of interest cases noted" previously).

Applying this principle to the facts adduced, we stated that, "while Sawyer may not have provided the legislators with direct kickbacks or commissions arising out of the specific official action, he may have intended the legislators generally to treat preferentially Hancock's interests, knowing that the free meals, entertainment, and golf would continue so long as favorable official acts were, at some point, taken." Id. We reversed the mail and wire fraud convictions, nevertheless,

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[6] The intent to deprive the public of honest services is distinct from the intent to deceive the public, which also must be proven (or some equivalent deceptive intent) as part of mail fraud's "scheme to defraud." See Sawyer, 85 F.3d at 729 n.12.

because we could not be sure that the jury convicted Sawyer based upon the Massachusetts gift statute (as a basis for the federal scheme to defraud) or the Massachusetts gratuity statute, and the former had been improperly charged in the court's instructions to the jury. We mandated a protective instruction to be used in cases such as this, which would help the jury understand the difference between "reprehensible misconduct" which is not a violation of federal law, and misconduct which does form the basis for a federal conviction. Id. at 741. Noting that prior cases usually involved "quid pro quo bribery or blatant conflict of interest," which was clearly illegal, we distinguished Sawyer's gratuities to Woodward (and other legislators) as involving conduct which "itself may not be very different, except in degree, from routine cultivation of friendship in a lobbying context," which does not violate federal criminal law. Id. We noted that "[t]he practice of using hospitality, including lavish hospitality, to cultivate business or political relationships is longstanding and pervasive." Id. Because the "difference between lawful and unlawful turns primarily on intent," we held that the court must instruct the jury that a lobbyist does not commit honest services fraud or violate the Travel Act if his "intent was limited to the cultivation of business or political friendship." Id. He commits those violations "only if instead or in addition, there is an intent to cause the recipient to alter her official acts." Id.

III

Sufficiency of the Evidence

Woodward's principal argument on appeal is that there was insufficient evidence for the jury to find beyond a reasonable doubt that he had the requisite intent on any of the four counts at issue here. We will focus our discussion here on the mail and wire fraud counts. We held in Sawyer that the intent required for a Travel Act violation is the same as that for mail and wire fraud. 85 F.3d at 741. Woodward argues that the conspiracy count must fall because there is insufficient evidence to support the substantive counts that served as its objects.

Because theft of honest services constitutes a "scheme or artifice to defraud" within the meaning of the mail and wire fraud statutes, see Sawyer, 85 F.3d at 723-24, the question becomes whether the jury could reasonably have found that Woodward intended to steal his honest services from the public. As Woodward phrased it in his brief, "[t]he central question is whether by accepting his friend's largesse Woodward intended to be influenced to support Hancock's legislative interests."

A

Standard of Review

In determining the evidentiary sufficiency of a guilty verdict, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). "The scope of review is over the totality of the evidence, both direct and circumstantial." United States v. Czubinski, 106 F.3d 1069, 1073 (1st Cir. 1997).

Woodward focuses most of his sufficiency challenge on an alleged lack of intent to be influenced. He argues that the evidence was insufficient to show that Woodward accepted Sawyer's gratuities with the intent to deprive the public of his honest services by performing official acts on behalf of Hancock (or the life insurance industry) -

Woodward "bear[s] a heavy burden" in arguing insufficiency of the evidence, even with respect to this intent element. United States v. Biaggi, 853 F.2d 89, 99 (2d Cir. 1988). "An appellate court plays a very circumscribed role in gauging the sufficiency of the evidentiary foundation upon which a criminal conviction rests. The court of appeals neither weighs the credibility of the witnesses nor attempts to assess whether the prosecution succeeded in eliminating every possible theory consistent with the defendant's innocence." United States v. Noah, 130 F.3d 490, 494 (1st Cir. 1997). We "defer, within reason, to inferences formulated by the jury in the light of its collective understanding of human behavior in the circumstances revealed by the evidence." United States v. Guerrero 114 F.3d 332, 339 (1st Cir.) (internal quotation marks omitted), cert. denied sub nom. Pilco v. United States, 118 5. Ct. 184 (1997).

In reviewing Woodward's contention, "we must view the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor, and we must affirm the convictions so long as, from the inferences reasonably drawn, the jury might fairly have found the requisite connection beyond a reasonable doubt." Biaggi, 853 F.2d at 99 (citations omitted); see Sawyer, 85 F.3d at 731.

As we stated in Sawyer (in the context of intent to deceive):

> The evidence need not compel an intent-to-deceive finding; rather, it is only required that a reasonable jury could be persuaded, beyond a reasonable doubt, that [Woodward] had such intent. And we are mindful that a jury may choose among the reasonable alternatives posed by the evidence. Finally, the specific intent to deceive may be proven (and usually is) by indirect and circumstantial evidence.

Sawyer, 85 F.3d at 733 (citations omitted).

"Despite the deference that characterizes appellate review of jury verdicts, juries do not have carte blanche. The appellate function . . . requires the reviewing court to take a hard look at the record and to reject those evidentiary interpretations and illations that are unreasonable, insupportable, or overly speculative. This function is especially important in criminal cases, given the prosecution's obligation to prove every element of an offense beyond a reasonable doubt." United States v. Spinney, 65 F.3d 231, 234 (1st Cir. 1995) (citations omitted). "[A]n appellate court must reverse a conviction on the grounds of evidentiary insufficiency 'where an equal or nearly equal theory of guilt[] and a theory of innocence is supported by the evidence viewed in the light most favorable to the verdict.'" Guerrero 114 F.3d at 344 (quoting United States v. Andujar, 49 F.3d 16, 20 (1st Cir. 1995)) . In such cases, "a reasonable jury must necessarily entertain a reasonable doubt." Andujar, 49 F.3d at 20. Viewed in this context, we find that the government has met its burden of proof beyond a reasonable doubt." Andujar, 49 F.3d at 20. Viewed in this context, we find that the government has met its burden of proof beyond a reasonable doubt.

B

Intent (Counts 1, 4, 9, 14)

In Sawyer, we noted two of the ways that a public official can steal his honest services from his public employer: (1) the official can be influenced or otherwise improperly affected in the performance of his duties, 85 F.3d at 724, 729; or (2) the official can fail to disclose a conflict of interest, resulting in personal gain, id. at 724. The government asserts that the evidence supports the jury's finding that Woodward had the requisite intent to deprive the public of his honest services in both of these ways. We agree.

1. Influence in Official Action

As Woodward states in his brief, "the government must [have] demonstrate[d] that there was sufficient evidence for a rational jury to conclude that Woodward accepted the free meals and entertainment from Sawyer with the intent to perform official acts to favor Hancock's legislative interests." Def. Br. at 19. Identical standards apply in determining the "scheme to defraud" element under the mail and wire fraud statutes. Czubinski, 106 F.3d at 1076 n.10.

"The jury was entitled to infer [the defendant's] intent from the circumstances surrounding" his actions, from indirect, as opposed to direct, evidence. United States v. Fulmer, 108 F.3d 1486, 1493 (1st Cir. 1997); see United States v. Taylor, 54 F.3d 967, 975 (1st Cir. 1995) (noting that a showing of criminal intent "may be made wholly on the basis of circumstantial evidence"). Nor are juries "required to examine the evidence in isolation"; "'individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its

constituent parts.'" United States v. Ortiz, 966 F.2d 707, 711 (1st Cir. 1992) (quoting Bourjaily v. United States, 483 U.S. 171, 179-80 (1987)); see also United States v. Montminy, 936 F.2d 626, 627-28 (1st Cir. 1991).

In Sawyer, we reviewed much of the same evidence that was presented to the jury here, and determined that the evidence was sufficient "to prove [Sawyer's] intent to influence the legislators' official acts." 85 F.3d at 731. We noted that Sawyer continually gave gifts for the purposes of gaining access and developing a relationship with Woodward and other legislators. From this, the jury could have inferred that Sawyer intended to induce official actions favorable to Hancock's interests. Id.; see also id. at 739 (noting that Sawyer gave items of substantial value to legislators like Woodward who had the ability to take official action favorable to Hancock, that those gifts ceased after the legislators left office, and that Sawyer had long-term ongoing interests in official actions and knew the gratuities were illegal; and concluding that the jury could rationally have inferred that "the gratuities were motivated by the legislators' performance of official duties, i.e., that they were given 'for or because of any official act, ' within the meaning of the Massachusetts gratuity statute, Mass. Gen. L. ch. 268A, § 3.").

The same inferences regarding Woodward's intent can be drawn from the evidence here, based upon the nature and sequences of events, certain explicit statements, and the suggestions of a cover-up. In Sawyer, of course, the jury was assessing the motivation of the donor of the gratuity, Sawyer, not that of the donee, Woodward. But it is an equally valid inference, from the foregoing evidence coupled with the fact that Sawyer and Woodward spent a good amount of time together,

that Woodward understood the gratuities and their purpose in the same way that his "close friend" Sawyer did. Woodward knew that Sawyer was giving him items of substantial value, continuing over a long period of time; he knew that Sawyer had a long-term ongoing interest in his official acts; and that he had the ability to take official action favorable to Hancock. Woodward also knew that his relationship with Sawyer began after he became a member of the Insurance Committee and that the gifts increased substantially shortly after he became chair of the committee that handled insurance legislation. Finally, Woodward knew that, at many of the same entertainment events that he enjoyed, Sawyer also wined and dined other legislators in a similar manner, and those legislators had only a business relationship, not a friendship, with Sawyer. In light of all this, the jury could have inferred that Woodward knew what the deal was - that the gratuities would continue as long as he voted favorably to Hancock's interests, see Sawyer, 85 F.3d at 730 - and that he intended to be influenced by the gratuities.

Moreover, the jury had additional evidentiary bases for drawing the inference that Woodward's intent included an illegal element rather than being solely based on friendship. After entertaining Woodward for several days at the Scottsdale COIL conference in 1991, Sawyer left the conference early, but left his credit card to be used for paying Woodward's golf and meal expenses during the remainder of the conference. This is not consistent with mere friendship as the sole purpose of the payments, but rather is more consistent with the theory of a gratuity made because of Woodward's potential official actions.

In addition, Woodward received some gratuities from Sawyer (although in lesser amounts) at events where other

legislators - mostly members of the Insurance Committee, who could also influence legislative acts in favor of Hancock - were also present. This too indicates an illegal gratuity more than the camaraderie of "close friends." Similarly, some of Woodward's gratuities came from LIAM, through its president, Carroll, who was not a personal friend of Woodward's.

The same inference can be drawn from the fact that the expenditures were not mutual but rather operated in one direction only. The standard operating procedure was for Sawyer to pay for meals, drinks and golf for Woodward; Woodward did not make similar payments for Sawyer. If the reason Sawyer "picked up the tab" for Woodward on some occasions was simply because the two men were "close friends," one would expect there to be a roughly equal number of occasions on which Woodward "picked up the tab" for Sawyer. But that was not the case.

Indeed, the only evidence in the record as to Woodward performing some reciprocal acts of treating his "close friend" Sawyer were the weekends spent on Cape Cod. On those occasions, Woodward invited the Sawyers to stay at the Woodward family's house on the Cape, where the Woodwards cooked some meals. In return, according to Woodward, Sawyer would pay for a group dinner at a nearby restaurant.

Significantly, the jury returned not guilty verdicts on all indictments alleging such reciprocal expenditures. In contrast, the jury weighed the evidence differently as to four counts charging Woodward with accepting gratuities in a non-mutual, non-reciprocal way. As to these, the jury apparently viewed Sawyer's expenditures and Woodward's acceptance of them as not being based on the two men's friendship but rather based on

a business relationship: i.e., insurance industry lobbyist and Chair of the Legislature's Insurance Committee. The jury recognized - and this recognition is supported by the evidence of record - that the two men had two types of relationships, a personal friendship and a business relationship. Woodward's acceptance of expenditures that were part of their friendship was not illegal, but his acceptance of expenditures in the context of their business relationship constituted theft of the honest services that Woodward owed to his constituents. We think the evidence was sufficient for a reasonable juror to so conclude beyond a reasonable doubt. The jury was free to "choose among the reasonable alternatives posed by the evidence," Sawyer, 85 F.3d at 733, and we will not second-guess the jury's conclusion in this regard.

Another reason the jury could have rejected Woodward's contention that Sawyer picked up his tab solely because of friendship rather than as an attempt to influence is the direct statements showing how Woodward expected to receive gratuities from Sawyer (and, through him, from Hancock). In 1989, at a COIL conference in Florida, Lorraine Bohannon, the former staff director of the Insurance Committee, who reported directly to Woodward, went out to dinner with Woodward, Sawyer, and their spouses. There is no evidence that Bohannon had any kind of personal friendship with Sawyer. After dinner, Bohannon offered to Woodward to pay a portion of the bill, and Woodward's response was: "Don't worry about it; it's taken care of." Sawyer picked up the tab and was reimbursed by Hancock for the bill.

The government presented evidence of another direct statement to demonstrate Woodward's illegal intent. After

Woodward left the legislature, he expressed interest in working for Hancock as a lobbyist. He asked Sawyer to help him obtain the job. Sawyer told Woodward he was not qualified for the job, and Woodward was "very hurt." Subsequently when he talked to Committee research director Robert Smith about the Hancock job, Woodward said, in effect, "After all I did for Bill Sawyer, you know, I can't believe he's not - he can't get me a job" or "he's not getting me a job." The prosecutor asked Smith whether Woodward told him what "he felt he had done for Bill Sawyer," and Smith replied, "Not specifically, just generally. 'After all these years as Chairman of the committee and trying to do the right thing and being willing to take on tough issues, I would - I expected, you know, more assistance than I received.'"

Woodward argues that this conversation does not demonstrate any illegal intent on Woodward's part. He points out that, at trial, Smith could not recall Woodward saying "after all I've done for Sawyer," but only "after all I've done. Woodward also notes that "trying to do the right thing" could have meant following his own conscience, not necessarily doing the "right thing" for Sawyer and Hancock. Similarly, "taking on tough issues" did not necessarily mean "taking on tough issues" for Sawyer or Hancock At trial, Smith testified that he did <u>not</u> interpret these phrases in an illegal manner.

But Woodward's argument is belied by the totality of Smith's testimony about the conversation, or at least a reasonable jury could have so inferred. In his grand jury testimony, which was used by the government at trial, Smith testified to the more directly inculpatory language: "after all I did for Bill Sawyer." And Smith's trial testimony covered additional incriminating evidence that Smith had revealed to the grand jury but did not

include in his direct testimony at trial. When asked (at the grand jury session) to repeat the whole conversation, Smith testified:

> [Woodward] said that he had spoken to Bill Sawyer and that Bill Sawyer had been reluctant to help him, and Representative Woodward at that time -- as many legislators do, they don't remember the specific bill numbers or subject matter, but they'll remember in general if they were favorable towards someone or not -- said to me "you would think after all the years and everything I've done I would be treated better than I have been treated."

This juxtaposition of the "everything I've done" language with the notion of legislators "remember[ing] in general if they were favorable towards someone or not" carries a strong implication that, at least in Smith's mind as he heard Woodward make the quoted statements, Woodward's reference to "all he had done" was meant in the sense of taking action in the legislature to favor Sawyer and Hancock's interests.

Smith's grand jury testimony, elicited after an inconsistent statement at the trial, constitutes substantive evidence under Fed. R. Evid. 801(d) (1) (A). The jury, in assessing Smith's credibility in the context of all his testimony, could well have believed that Smith's grand jury testimony - with its incriminating inferences - was true; and the jury could have concluded that Smith's trial testimony was not believable to the extent it undercut the grand jury testimony. On appeal, of course, we view the evidence in the light most favorable to the verdict, not the light most favorable to Woodward. Credibility assessments are properly left to the jury. United States v.

Manpual-Corchado, 139 F.3d 34, 43 n.20 (1st Cir 1998). And juries are not required to evaluate the evidence in isolation; "individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it." Bourjaily, 483 U.S. at 179-80.

The inference of illegal intent grows even stronger when we consider another aspect of what Woodward told Smith about his attempt to persuade Sawyer to help him get a job at Hancock. According to Smith's trial testimony, Woodward said: "If he [Woodward] could not get the job himself he'd like to see his son Brian get the job." Smith testified that he was unaware of any experience that Woodward's son, Brian, had in insurance matters. This, too, carries the implication that Woodward was expecting some kind of reward from Sawyer/Hancock for all his years of favoring the industry's position in the legislature.

In addition, as Woodward recognizes, "[i]ntent can be inferred from a defendant's conduct, viewed in light of all the surrounding circumstances." Def. Br. at 19; see, e.g., Gaunt v. United States, 184 F.2d 284, 290-91 (1st Cir. 1950). Thus "[t]he best evidence of Woodward's intent to perform official acts to favor Hancock's (and LIAM's) interests is the evidence of Woodward's actions on bills which were important to Hancock." Id. Unfortunately for Woodward, the evidence supports the jury's verdict, rather than undermining it as he contends.

It is not necessary for the government to link a particular gratuity with a specific act in order to obtain a conviction. Sawyer, 85 F.3d at 738-39; see discussion supra at p. 13. Nevertheless, Woodward disputes the extent to which, in his official capacity as chair of the Insurance Committee, he took action that served the interests of his benefactors. The evidence

does not support his contention. According to Robert Smith, Woodward was the most pro-life-insurance-industry chair of the Committee, of the seven House and Senate chairs with whom Smith worked during the ten years that Smith served as the Committee's research director Woodward even took pro-industry positions in opposition to his own committee. As an example, in each year from 1985 through 1990, the legislature considered a bill proposing mandatory discounts on life insurance for non-smokers. Hancock and LIAM opposed the bill. In 1989, the bill received favorable recommendation from the Insurance Committee based on support from Senator Linda Melconian, Woodward's co-chair of the Committee. But despite the Committee's favorable report, Woodward led the opposition to the bill in debate before the full House of Representatives, and was successful in defeating the so-called "non-smoker's bill" for that session. Hancock's vice-president, who directly supervised Sawyer, called the bill's defeat a "significant victory for the industry."

Woodward also led the Insurance Committee to support and report favorably bills proposed by the industry. Among these were bills allowing life insurance companies to change the ways in which they valued real estate assets, to adjust pension funds, to provide financial services, and to be flexible in corporate governance and finance.

In addition, more than any other co-chair from 1985-95, Woodward "carried" bills sought by the life insurance industry. This means that, after the bill left the committee, Woodward served as the point person to push these bills through the legislative process.

Woodward challenges this characterization of the meaning of "carrying" a bill after it leaves committee. Woodward contends that "carrying" is merely a ministerial function, that it simply refers to the fact that the chair of any committee of the Massachusetts legislature "sign[s] the paperwork recommending a bill favorably and [is] available to answer questions from non-committee legislators when [the bill is] presented to the House or Senate floor." Woodward relies on Robert Smith's testimony for the proposition that carrying legislation does not necessarily mean advocating or leading the debate for the bill on the House floor, that that role is normally reserved for the legislator who sponsors the bill.

Smith's testimony to this effect, however, was impeached with his grand jury testimony in which he had testified that "carrying" meant actively guiding bills through the legislative process. As we noted in discussing the conversations about getting Woodward a job at Hancock, the jury was entitled to believe this portion of Smith's testimony (i.e., introduction at trial of his prior grand jury testimony) - that "carrying" means actively guiding a bill through the process; it is not merely ministerial -and the jury was entitled to disbelieve other parts of his trial testimony that supported Woodward's interpretation to the contrary.

Woodward points to thirty-one (31) bills that he supported despite opposition on the part of Hancock and the insurance industry. But, as the government notes, the proper an&lysis is to examine all bills considered by the Committee in context, not to isolate a relatively small number of bills in an effort to show that Woodward was not 100% in the industry's pocket. The record reflects that, during his six years as co-chair

of the Insurance Committee, there were approximately one hundred bills per year that were of interest to the life insurance industry, for a total of six hundred bills during his tenure Woodward opposed the industry's position on only thirty-one of those bills. Moreover, at least ten of the opposed bills were duplicates of previously filed bills. Of the remainder, only three actually related to life insurance. The rest concerned mandated benefits for health insurance which were of less importance to the life insurance industry, in particular to Hancock. This is because, as Hancock's attorney testified, life insurance was Hancock's "big money earner in terms of profit. The company's group health insurance business was "[o]ne of the lesser profit earners." As already noted, several of the bills where Woodward's position conformed to the life insurance industry's positions were of great importance to the industry in that the bills significantly improved the industry's profitability.

Woodward relies heavily on Czubinski, 106 F.3d at 1076, where we cited Sawyer for the "most important[]" proposition that the government must do more than "merely indicate wrongdoing by a public official, but must also demonstrate that the wrongdoing at issue [was] intended to prevent or call into question the proper or impartial performance of that public servant's official duties." Czubinski, 106 F.3d at 1076 (citing Sawyer, 85 F.3d at 725). In Czubinski, we explained that Czubinski's "case falls outside of the core of honest services fraud precedents," in that he was "not bribed or otherwise influenced in any public decisionmaking capacity." Id. at 1077. We also distinguished Czubinski's "relatively straightforward" job - responding to information requests from the public - from "a discretionary, decision-making role," which

"raise[s] the specter of secretive, self-interested action." Id.[7] We found "no evidence that Congress intended to create what amounts to a draconian personnel regulation," by "transforming governmental workplace violations into [federal] felonies." Id.

The instant case is very different from Czubinski. As Woodward recognizes, Czubinski did not receive or intend to receive any tangible benefit from his conduct, whereas Woodward did. Additionally, Czubinski's official duties did not involve the discretionary, decision-making role of a legislator. "Notwithstanding these factual differences," Woodward asserts, "Czubinski and the instant case are similarly flawed by the failure of proof on the critical fraudulent intent element." We disagree. As discussed supra, the jury in the present case could justifiably have inferred the fraudulent intent element. Woodward did receive tangible benefits here, as Czubinski had not. And the connection between the gratuities and Woodward's official acts could have been justifiably inferred from the fact that Woodward had discretion to act or not act in ways that would further the insurance industry's interests; this discretion extended both to the bottom line (support of or opposition to the industry's

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[7] Cf. United States v. Rabbitt, 583 F.2d 1014, 1026 (8th Cir. 1978) (finding no deprivation of honest services where state representative introduced friend's firm to public officials responsible for awarding city contracts, where defendant played no role in such awards and did not otherwise fail to fulfill his official duties, and where government cited no standard requiring defendant to disclose his interest in the contracts); United States v. McNeive, 536 F.2d 1245, 1246 (8th Cir. 1976) (finding no deprivation of honest services of city plumbing inspector despite acceptance of unsolicited gratuities, where inspector's administrative duties were non-discretionary and no evidence that gratuities deterred McNeive from conscientiously performing duties).

position on legislation) and to the degree of vigor with which Woodward championed the industry's positions.

2. Failure to Disclose Conflicts of Interest

In addition to demonstrating Woodward's intent by evidence showing that he was influenced or otherwise improperly affected in performing his duties, the government argues that Woodward's intent is also demonstrated by his failure to disclose his conflict of interest although he was required to do so. We agree.

Massachusetts law mandates such disclosure on his Statements of Financial Interest (SFIs). Mass. Gen. Laws ch. 268B, § 5 (West 1990). In addition, separate and apart from the state statute, "[t]he obligation to disclose material information inheres in the legislator's general fiduciary duty to the public." Sawyer, 85 F.3d at 733 n.17. We recognized in Sawyer that the nondisclosure of a conflict of interest is a second way in which a public official can steal his honest services. 85 F.3d at 724; cf. id. at 728 ("[U]nlike the honest services fraud cases, noted above, in which an official was bribed or took official action based on a secret conflict of interest, a gift statute violation, even if intentional, does not itself amount to honest services fraud." (Emphasis added)). The evidence of Woodward's non-disclosure is also probative of Woodward's intent; it supports the jury's finding that he had the requisite intent.

As we stated in Sawyer:

> A public official has an affirmative duty to disclose material information to the public employer. When an official fails to disclose a personal interest in a matter over which she has decision-making power, the public is deprived

> of its right either to disinterested decision making itself or, as the case may be, to full disclosure as to the official's potential motivation behind an official act.

Sawyer, 85 F.3d at 724 (citing Silvano, 812 F.2d at 759).[8]

In addition to the general "affirmative duty to disclose" discussed in Sawyer, Woodward had a specific statutory duty each year to file a Statement of Financial Interests with the Massachusetts State Ethics Commission. See Mass. Gen. Laws ch. 268B, § 5. Woodward was required to disclose on his SF1 forms all gifts he or his immediate family received, aggregating more than $100 per year, from lobbyists or businesses that had a direct interest in legislation. He had to sign the forms under oath. Woodward did not report the gratuities he received from Hancock or LIAM on any of his SF1 forms submitted for the years 1984 through 1992.

Woodward contends that his failure to comply with the Massachusetts reporting statute, while "reprehensible," is not relevant here. We disagree. In Czubinski, we listed "the failure of public decision-makers to disclose certain conflicts of interest" as one of three examples of "serious corruption" on the part of public officials that would "typically" justify an honest services conviction. 106 F.3d at 1076. Woodward's failure to

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[8] In United States v. Margiotta, 688 F.2d 108 (2d Cir. 1982), the court upheld the conviction for theft of honest services of a defendant who was not even an elected public official (he was the Republican Committee Chairman for Nassau County and for the Town of Hempstead). The defendant's liability was based in part on the grounds that he had a fiduciary duty to the public, and part of that duty was to disclose any personal interest in a matter over which he might have to make a decision, including bribes by interested parties.

report supports the implication that Woodward was aware that these gratuities were improper, especially in light of the fact that "[m]uch of his entertainment . . . took place out-of-state -- usually at industry and legislative conferences -- where members of the Massachusetts citizenry generally would not observe the questionable activities." Sawyer, 85 F.3d at 733. Woodward had every incentive to keep these "questionable activities" secret from the public by not disclosing them on his SFIs. The SFIs are public documents, which are frequently scrutinized by the press and political opponents during election years. In fact, the only gift Woodward ever reported was a local, public golf tournament sponsored by Massachusetts Candy & Tobacco Distributors, Inc., which he reported after learning that the tournament was under investigation by the State Ethics Commission.

We agree with the government that Woodward's intentional failure to disclose the Hancock and LIAM gifts in itself provides a solid basis for the jury to find that Woodward had the requisite intent to deprive the public of his honest services. This same evidence also supports the finding that Woodward had the intent to deceive necessary for a mail and wire fraud conviction. See supra at 13, n.6. "[A]n official's intentional violation of the duty to disclose provides the requisite 'deceit.'" Sawyer, 85 F.3d at 732 (quoting Silvano, 812 F.2d at 760).[9]

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[9] In the Sawyer case, SF1 forms were not available to the government as proof of illegal intent, because, unlike Woodward, Sawyer had no obligation under Mass. Gen. Laws ch. 268B, § 5 to report the gratuities in a publicly filed document that protects against conflicts of interest.

Viewing the record in the light most favorable to the verdict, a rational jury could have found the requisite intent from the trial evidence. The evidence was sufficient for a rational juror to find, beyond a reasonable doubt, that Woodward accepted gratuities from Sawyer with the intent to defraud the public of its right to his honest services, and that he had the specific intent to deceive. See also Sawyer, 85 F.3d at 742 (finding that the evidence adduced there "would be adequate to infer improper intent").

C

Other Elements of Wire Fraud (Count 9)

As noted supra, to support a conviction for mail or wire fraud, the government must prove beyond a reasonable doubt: "(1) the defendant's knowing and willing participation in a scheme or artifice to defraud with the specific intent to defraud, and (2) the use of the mails or interstate wire communications in furtherance of the scheme." Sawyer, 85 F.3d at 723; see 18 U.S.C. § 1341, 1343.

Woodward also challenges his convictions based on the second requirement. He argues that the government offered insufficient evidence to prove either that Woodward caused the wiring or that the wiring was "for the purpose of executing [the] scheme" to defraud See 18 U.S.C. § 1343.

The wire fraud count relates to a COIL conference in Orlando, Florida, in November, 1990. The indictment alleged that on November 21, 1990, a call was placed from Boston, Massachusetts, to Lake Buena Vista, Florida, and that its purpose involved "[a]rrangements related to entertainment in Florida."

Woodward claims that he did not "cause" this telephone call to be made, and that it was not made for the purpose of

executing a scheme for Woodward to defraud the public of its right to his honest services. We disagree on both points. As we stated in Sawyer, Woodward "'need not personally use the wires as long as such use was a reasonably foreseeable part of the scheme in which [he] participated.'" 85 F.3d at 723 n.6 (quoting United States v. Boots, 80 F.3d 580, 585 n.8 (1st Cir.), cert. denied, 117 5. Ct. 263 (1996)). In addition, "[t]he use of the mails or wires to further the fraudulent scheme need only be 'incidental.'" Id. (quoting United States v. Grandmaison, 77 F.3d 555, 566 (1st Cir. 1996)).

Here, Woodward concedes that the jury could reasonably have inferred from the evidence that Hancock's Functions Coordinator called the Florida hotel on or about November 21, 1990, for the purpose of reserving a room, so Sawyer could attend the COIL conference in Orlando. Nevertheless, Woodward claims that he could not have reasonably foreseen that a Hancock employee would make a room reservation for Sawyer at this COIL conference, nor that she would use the telephone to do so. According to Woodward, Sawyer's "presence [at the conference] could have been ensured by many means other than the fortuity of an interstate telephone call to reserve his hotel room." We disagree.

Woodward knew full well that Sawyer would need a hotel room in Florida for the COIL conference, and that Sawyer's office was located in Massachusetts. Woodward could reasonably have foreseen that the hotel reservations in Florida would be made by phone either by Sawyer or by someone acting on his behalf. That Sawyer could conceivably have made his room reservation in person or by mail does not undermine the foreseeability of a telephone call The jury was entitled to use its

common sense to infer that a reasonable person would have foreseen a telephonic reservation, as a means commonly employed in the business world for transactions of this type. Thus, the jury was entitled to conclude, based on the evidence presented, that Woodward "caused" the wiring.

Woodward further argues that "the evidence presented was insufficient to show that the purpose of this call was to execute a scheme by Woodward to deprive the public of its right to his honest services by receiving gratuities from Sawyer with the intent to favor unlawfully Hancock's legislative interests." Def. Br. at 27. We disagree. The jury could reasonably have concluded that the call was made in furtherance of the scheme to defraud. Sawyer would not have been able to give Woodward the illegal gratuities during the COIL conference if Sawyer did not have a hotel room in which to stay for the four days of the conference. The call in question secured that room, and thus played an essential role in the scheme.

Our conclusion is buttressed by decisions involving mail fraud, which is analogous to wire fraud for these purposes. The focus of our inquiry on this question "ought to be concerned less with the precise contents of the particular mailings than with the role those mailings played in the execution of the scheme to defraud." United States v. Serino, 835 F.2d 924, 928 (1st Cir. 1987). In Silvano, we upheld a mail fraud conviction of government officials, where the defendants neither placed nor received any of the mailings. (The mailings consisted of the payment of premiums and commissions, all incidental to, but related to, commission of the fraud.) We held that these mailings were sufficiently in furtherance of the fraud. 812 F.2d at 760. We reasoned that "the federal mail fraud statute sweeps

broadly and its prohibitions extend to the use of the mails by corrupt local government officials. It is similarly settled that use of the mails need be no more central to the illegal scheme than were the mailings supporting the counts upon which [the defendants] were convicted." Id.

The evidence was sufficient to support Woodward's wire fraud conviction.

D

Mail Fraud (Count 4)

With respect to the mail fraud count, Woodward concedes that, "because the evidence showed he was at events for which Sawyer paid with his credit card, it was reasonably foreseeable to him that Sawyer would be billed by mail for these credit card expenditures on his behalf." Def. Br. at 28. Therefore he does not contest the fact that he "may be said to have 'caused' the mailing alleged in Count 4 when he let Sawyer pick up the tab." Id.

But he contends that "the purpose of the mailing strays far from the execution of a scheme by Woodward to defraud the public." Id. at 29. He argues that the scheme had already reached fruition by the time the mails were used. He points to United States v. Maze, 414 U.S. 395 (1974), where the Supreme Court noted that "Congress could have drafted the mail fraud statute so as to require only that the mails be in fact used as a result of the fraudulent scheme. But it did not do this; instead, it required that the use of the mail be 'for the purpose of executing such scheme or artifice.'" Id. at 405 (footnote omitted) (emphasis added).

In the present case, the mailing in question was sent by Citibank Visa to Sawyer, billing him for charges arising from

Sawyer's use of his Visa card to pay for illegal gratuities given to Woodward. According to Woodward, because the mailing took place some three to four weeks after Sawyer purchased the meals and entertainment for Woodward, the use of the mail was "a result of" the fraudulent scheme but not "for the purpose of executing" the scheme. Id. We disagree.

Woodward's argument focuses too narrowly, on each gratuity individually. His contention assumes a new fraudulent scheme began and ended every time Sawyer used his credit card to pick up the tab for Woodward. On the contrary, the evidence supported the conclusion that the fraudulent scheme in which Woodward and Sawyer participated was an ongoing scheme, lasting for years and involving Sawyer's use of his credit card. Every month, Visa would use the mails to bill Sawyer for his charges; if Sawyer did not pay those bills, his credit line would have been terminated and the gratuities could not have continued as Woodward and Sawyer expected. It was thus a necessary part of the ongoing scheme that Sawyer pay his bill after receiving it in the mail See Sawyer, 85 F.3d at 730 ("[A] person with continuing and long-term interests before an official might engage in a pattern of repeated, intentional gratuity offenses in order to coax ongoing favorable official action in derogation of the public's right to impartial official services.") This case is therefore distinguishable from Maze, where the mailing involved only a post-fraud accounting among victims, after the defendant's fraudulent use of credit cards was already completed. See Maze, 414 U.S. at 402; Schmuck v. United States, 489 U.S. 705, 714 (1989) (distinguishing and limiting

Maze to cases in which the fraudulent scheme has come to fruition).[10]

Woodward cursorily argues that the wiring and mailing are merely "a pretext to manufacture federal jurisdiction over a local offense." Def. Br. at 30 (mail fraud); see id. at 28 (wire fraud). We have already rejected such a federalism claim: "Congress may protect the integrity of the interstate mails and wires by forbidding their use in furtherance of schemes to defraud a state and its citizens, whether or not it can forbid the scheme itself." Sawyer, 85 F.3d at 722-23 (citations omitted).

The evidence was sufficient to support the mail fraud conviction.

E

Travel Act (Count 14)

The elements of a Travel Act violation include: (1) interstate travel or the use of an interstate facility; (2) with the intent to promote, manage, establish, carry on, or facilitate an unlawful activity (here, violation of the Massachusetts gratuity statute, Mass. Gen. Laws ch. 268A, § 3 (West 1990); and (3)

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[10] Woodward also points to United States v. Cross, 128 F.3d 145 (3d Cir. 1997), cert. denied, 118 S. Ct. 1519 (1998), but that case is also distinguishable. In Cross, the defendants had conspired to fix the outcomes of various judicial proceedings, and the mailings alleged as the basis for the mail fraud conviction were simply the official notices sent by the court to notify the parties of the outcomes of their cases. The court held that such "legally required mailings . . . cannot be deemed to have been made 'for the purpose of executing' a fraudulent scheme." Id. at 152; see also id. at 152 n.4 (distinguishing Schmuck, 489 U.S. at 713 n.7, where the mailings "were a direct result of and would not have occurred but for the fraudulent scheme"). In the present case, Sawyer's Visa bills were certainly not "legally required mailings" that simply informed people of the already completed outcome of the scheme. Nor would those Visa bills have been mailed "but for the fraudulent scheme." Cross, 128 F.3d at 152 n. 4.

followed by performance or attempted performance of acts in furtherance of the unlawful activity. See 18 U.S.C. § 1952; United States v. Arruda, 715 F.2d 671, 681 (1st Cir. 1983).

Woodward argues that the evidence supporting the Travel Act conviction was deficient in four respects. First, he argues that the evidence was insufficient to establish the requisite criminal intent to violate 18 U.S.C. § 1952. We disagree, for the same reasons discussed in Part 111(B), supra, in relation to his intent under the mail and wire fraud statutes. See Sawyer, 85 F.3d at 741 (equating intent requirements of mail and wire fraud statutes with that required under Travel Act).

Second, Woodward maintains that, in order to prove a violation of the Travel Act, the government had to prove that Woodward violated the bribery laws of Florida. The Travel Act punishes traveling in interstate commerce for the purpose of carrying on any unlawful activity; such activity encompasses the commission of bribery "in violation of the laws of the state in which committed or of the United States." 18 U.S.C. § 1952(b)(2). The indictment incorporates the Massachusetts gratuity statute, Mass. Gen. Laws ch. 268A, § 3, as the underlying bribery offense. Woodward contends that the bribery, if any, took place only in Florida, and therefore, without evidence of any Florida bribery statute, the Travel Act conviction must be reversed. This argument is unavailing.

The Travel Act "does not require the government to prove that the alleged 'unlawful activity' violates the laws of the state ultimately traveled to," or of the state where money actually changed hands. United States v. Walsh, 700 F.2d 846, 854-55 (2d Cir. 1983) (mayor of city in New Jersey agreed in New Jersey to accept bribe and traveled to New York to collect it);

see United States v. Jones, 642 F.2d 909, 913 (5th Cir. 1981). A conviction may be sustained where the evidence demonstrates "unlawful activity" in violation of the laws of the state where the effects of the fraudulent scheme are felt, in this case, the state whose citizens are defrauded of their legislator's honest services. See Walsh, 700 F.2d at 854-55. Here, Woodward is a legislator from Massachusetts, and the jury could have concluded that the gratuity, though paid in Florida, was paid for the purpose of influencing legislative activities in and affecting Massachusetts. As we discuss below, that is sufficient.

Woodward's third challenge to his Travel Act conviction involves timing. He asserts that there was no evidence that Woodward performed any acts in furtherance of the unlawful activity after the interstate travel on November 24, 1990, as alleged in the indictment. Woodward notes that, although the Travel Act requires such the Massachusetts gratuity statute does not require any subsequent activity to be taken in Massachusetts after the Florida bribe. As evidence of Woodward's post-gratuity activity, the government points to Woodward's action with respect to S. 641, which proposed premium reductions in life insurance for policyholders who were non-smokers. The bill was originally reported favorably out of the Insurance Committee on May 7, 1990. Then on July 24, 1990, just before becoming law, the House of Representatives recommitted the bill to the Insurance Committee. The effect of a bill's recommittal is that both chairs would have to act in order for the bill to be released. The bill languished in the Insurance Committee with no further action taken through January 1, 1991, after Woodward received the Florida gratuities and prior to his removal as co-chair. Woodward's co-chair, Senator Melconian, had actively

supported the 1989 bill by requesting a favorable recommendation from the Insurance Committee. The jury could, therefore, reasonably have inferred that Woodward prevented any further action on S. 641, because in the previous year he led the floor debate, on behalf of Hancock and LIAM, against a similar non-smokers bill.

Woodward's receipt of the gratuities in Florida and the subsequent recommittal of S. 641 through January 1991 provided sufficient evidence to allow the jury to find that Woodward performed an act in furtherance of the unlawful activity after the travel to Florida on November 24, 1990. Arruda, 715 F.2d at 682. Woodward's timing argument thus fails.

Woodward's fourth argument against his Travel Act conviction is that "the payment of the 'bribe' in Florida" has such an "attenuated relationship to Massachusetts" that it would violate the "effects doctrine." Def. Br. at 32. "Under this doctrine, a sovereign only possesses jurisdiction to prosecute a crime where, inter alia, 'the effect within the territory is substantial.'"[11] Id. (quoting Commonwealth v. Beneficial Fin.

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[11] The "effects doctrine" originated in international law, where it held that a country may regulate conduct occurring outside its territory which causes harmful results within its territory. See, e.g., Strassheim v. Daily, 221 U.S. 280, 285 (1911); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945). Under the territorial effects doctrine, jurisdiction exists only when significant effects were intended within the prescribing territory. Laker Airways Ltd. v. Sabena Belgian World Airlines, 731 F.2d 909, 923 (D.C. Cir. 1984); Aluminum Co. of America, 148 F.2d at 444. This jurisdictional concept of international law has been applied to jurisdiction by one state over criminal activities of out-of-state entities which affect the forum state. See Beneficial Fin. Corp., 275 N.E.2d at 57 n.8; cf. FTC v. ComDagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1317 n.93 (D.C. Cir. 1980). The effects doctrine has also been applied in determining whether a forum state's courts may exercise personal jurisdiction over a nonresident defendant, via the forum's long-arm statute, without violating the due process clause of the Fourteenth Amendment.

Corp., 275 N.E.2d 33, 57 n.8 (1971)). Because acts that might otherwise be "gratuities" could be performed out-of-state without any corresponding "effect" in Massachusetts, Woodward maintains that Massachusetts would lack jurisdiction to prosecute purely out-of-state expenditures. Def. Br. at 32 (citing Heath v. Jones, 941 F.2d 1126, 1139 (11th Cir. 1991) (no due process violation when state prosecutes crime that started within its borders and concluded in another state); Commonwealth v. Levin, 417 N.E.2d 440, 451 (Mass. App. Ct. 1981) (state may prosecute acts performed outside of its jurisdiction where acts are intended to produce and actually produce detrimental effects within the state))

Woodward asserts that the government failed to produce any evidence of detrimental effect actually resulting from the out-of-state expenditures; the "mere possibility of future action favorable to Hancock is not an 'effect, let alone one that is 'substantial." Nor would alteration of official acts be the 'direct' or foreseeable' result of lobbyists entertaining legislators at out-of-state conferences." Def. Br. at 33 (citing Sawyer, 85 F.3d at 741). We disagree.

The Massachusetts gratuity statute prohibits public employees from receiving "anything of substantial value . . . for or because of any official act . . . performed or to be performed by him." Mass. Gen. Laws ch. 268A, § 3. "The concern behind the gratuity statute, like the bribery statute, is the

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See Calder v. Jones, 465 U.S. 783, 788-90 (1984); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 776 (1984); but see Resolution Trust Corp. v. First of America Bank, 796 F. Supp. 1333, 1337-38 (C.D. Cal. 1992) (refusing to extend the effects doctrine from the field of intentional torts to a contract claim).

potential undermining of official integrity." Sawyer, 85 F.3d at 735 (emphasis added). Indeed, when someone gives a stream of illegal gratuities to a public official, a sense of being beholden to the giver's interests is exactly the kind of influence that the giver is trying to develop. See id. at 730. The potential effect on Massachusetts when one of its own legislators accepts gratuities out-of-state paid by someone with an interest in Massachusetts legislation is a sufficient nexus to satisfy the effects test and give Massachusetts jurisdiction to prohibit such conduct.

Besides this potential effect, of course, Woodward's receipt of gratuities in Florida was linked also to his official acts in Massachusetts. Among these acts is his recommittal of a particular bill, Senate Bill 641 (S. 641), shortly after he returned from Florida, as already discussed. And they also included his prior acts to champion the insurance industry's positions in the Legislature.[12] Woodward violated the Massachusetts gratuity statute, a prerequisite for his Travel Act violation, because he received something of "substantial value . . . for or because of any official act . . . performed or to be performed by him." Mass. Gen. Laws ch. 268A, § 3. We have already discussed our view that the evidence was sufficient to establish the linkage beyond a reasonable doubt.

Woodward's Florida gratuity was closely enough related to Massachusetts that his "effects doctrine" argument must fail.

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[12] For these prior acts, the gratuity was a reward, which is cognizable under the Massachusetts Gratuities Act even though it is not a violation of federal law. We note that, in order to violate the Travel Act, a gratuity need not be motivated by a "specifically identified official act." Sawyer, 85 F.3d at 735-38.

See Strassheim, 221 U.S. at 284-85 (holding that, when an individual's criminal acts were intended to and did produce detrimental effects within a state, the state may prosecute that individual even if he commits the act in another jurisdiction; applying this rule to an attempt to bribe a Michigan official who was in charge of making state purchases, even though defendant never entered Michigan); Heath, 941 F.2d at 1138-39. As the district court noted, to hold otherwise would "be at odds with the idea of official bribery or corruption . . . . [It would] provide a series of safe havens for those who wish to be bribed or [to be] the recipients of gratuities. [It would be] at odds with the statute itself [and] with the larger purposes of the Travel Act."

F

Conspiracy (Count 1)

In order to convict Woodward of conspiracy, the government had to prove that a conspiracy existed, that Woodward knew of and voluntarily participated in it, and that an overt act took place in furtherance of it. See United States v. Frankhauser, 80 F.3d 641, 653 (1st Cir 1996). The agreement need not be explicit; a tacit agreement will suffice. See id.; Direct Sales Co. v. United States, 319 U.S. 703, 712-13 (1943). To establish Woodward's voluntary participation in the conspiracy, the evidence must establish both his intent to agree and his intent to effectuate the object of the conspiracy. Frankhauser, 80 F.3d at 653; see also United States v. Piper, 35 F.3d 611, 615 (1st Cir. 1994). Neither the agreement nor Woodward's participation in it need be proven with direct evidence. See Glasser v. United States, 315 U.S. 60, 80 (1942); Frankhauser, 80 F.3d at 653.

Woodward's challenge to his conspiracy conviction is that it depends on the three substantive counts on which he was convicted, and he maintains that those counts suffered from sufficiency of the evidence infirmities that compel acquittal. "Because these infirmities extend to the conspiracy count," he argues, "Count 1 must fall for the same reasons as the three substantive counts of which it is comprised." Def. Br. at 34.

Woodward's argument is unavailing, because we have concluded that none of the three substantive counts comprising the conspiracy count was infirm. Therefore, the evidence is sufficient to support the conspiracy conviction for the same reasons discussed supra concerning the substantive counts, and Woodward's conspiracy conviction must stand.[13]

Based on the evidence in this record, we conclude that a reasonable jury could have found, beyond a reasonable doubt, that Woodward committed all elements of the four offenses of which he was convicted.

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[13] As we found in Sawyer, regarding the conspiracy alleged between Sawyer and his supervisor at Hancock (who obviously was further removed from the alleged deprivation of honest services than Woodward is), the jury could reasonably infer that both men "knew that the expenditures were unlawful, and from this, that the reason for the repeated illegal gifts and gratuities to key legislators was to secretly influence legislative action." 85 F.3d at 743. Given the evidence of repeated expenditures, "a jury could rationally find that [the defendant and his co-conspirators] agreed, at least tacitly, to the pattern of unlawful conduct. Finally, the jury could also infer that [the defendant and his coconspirators] knew that the mails and wires would be used to facilitate the entertainment . . . (e.g., the mailing of bills related to, and the making of telephone calls to arrange, the entertainment), and that interstate travel in connection with the entertainment (e.g., [expenditures for] out-of-state golf) would or had to occur." Id. Among the overt acts, we found the evidence sufficient to establish "Sawyer's giving of illegal gratuities" to, among others, Woodward. Id.

IV

Jury Instructions

Woodward contends that the district court erred in instructing the jury as to the intent necessary to support a conviction, contrary to our decision in Sawyer. Such a challenge to the jury instructions presents legal issues which we review de novo.[14] United States v. Phath, 1998 WL 244746, at *2 (1st Cir. May 20, 1998); United States v. Pitrone, 115 F.3d 1, 4 (1st Cir. 1997) (When the alleged error involves the instructions' adequacy in explaining the law, such as "interpretation of the elements of a statutory offense, it poses a question of law and sparks plenary review."); United States v. Fulmer, 108 F.3d 1486, 1494 (1st Cir. 1997). We must look at the entire charge, in light of the evidence, and determine whether, taken as a whole, the court's instructions "fairly and adequately submit[ted] the issues in the case to the jury," United States v. Cassiere, 4 F.3d 1006, 1022 (1st Cir. 1993) (internal quotation marks omitted), or whether they "tended to confuse or mislead the jury" as to the applicable principles of law, Sawyer, 85 F.3d at 726 (internal quotation marks omitted); see Fulmer, 108 F.3d at 1494.

The district court is not obligated to "follow the exact form and wording of the defendant's proposed instructions." United States v. Gibson, 726 F.2d 869, 874 (1st Cir. 1984);

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[14] The standard of review here, as in many situations, depends on the nature of the issue being presented. There are other cases involving jury instructions (for example, where the challenge is to the form or wording of the jury instructions) where the district court usually has more latitude and the proper standard of review is for abuse of discretion. See, e.g., United States V. Gibson, 726 F.2d 869, 874 (1st Cir. 1984).

Lawrence v. Gulf Oil Corp., 375 F.2d 427, 429 (3d Cir. 1967). Rather, "[t]he trial court has considerable latitude in charging the jury," so long as the charge as a whole fairly and adequately limns the law applicable to the controlling issues. Cassiere, 4 F.3d at 1022 (internal quotation marks omitted). That latitude is not unlimited, however. Clear, accurate, easily understood jury instructions are "vitally important in assuring that jurors grasp subtle or highly nuanced legal concepts.'" United States v. DeStefano, 59 F.3d 1, 4 (1st Cir. 1995). In Sawyer, in order to protect a defendant from being convicted based on conduct that was not actually illegal, we reversed the conviction and mandated a protective instruction in cases such as this one.

In the present case, Woodward challenges the district court's instruction on the issue that the court and the parties referred to as the issue of "mixed motive."[15] Proof of motive

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[15] We note that the district court's instruction on reasonable doubt was questionable. It stated: "Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things, of course, in this world that we know with absolute certainty. And in criminal cases, the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty."

Woodward has not appealed this portion of the jury instructions, so plain error review is appropriate. See Johnson v. United States, 520 U.S. 461, ____, 117 S. Ct. 1544, 1547 (1997); Fed. R. Crim. P. 52(b). The district court's instruction survives the high hurdle of plain error review, see Pitrone, 115 F.3d at 4-5, notably because the court gave significant emphasis to the presumption of innocence.

Nevertheless, we have previously joined other circuits in criticizing the Federal Judicial Center instruction from which the district court's "firmly convinced" language is drawn. See United States v. Gibson, 726 F.2d 869-874 (1st Cir.), cert. denied, 466 U.S. 960 (1984), pointing out that "reasonable doubt" definitions have a tendency to provoke unnecessary litigation. Id. at 874. We have expressed particular concern that "many definitions reduce the burden of proof on the government by

is not an element of the offenses. The phrase "mixed motive" was apparently meant as shorthand for the dual intent that might be supportable by the evidence in this case: the jury could have concluded (1) that Woodward accepted expenditures based on his legitimate friendship with Sawyer, or (2) that these were unlawful expenditures to influence official action (or some combination of the two).

Woodward argues that our decision in Sawyer intended to draw a bright line between "the merely unattractive and actual criminal conduct." Sawyer, 85 F.3d at 741. On one side of the line, according to Woodward, is conduct that is "unattractive" or even reprehensible" but is not illegal as a matter of federal criminal law. This would include lavish hospitality if intended to cultivate business or political relationships or friendships. On the other side of the line is illegal expenditures, i.e., those by lobbyists intended "to cause the recipient to alter her official acts." Id. According to Woodward, Sawyer presented this analysis "largely in stark 'either-or' terms." Def. Br. at 35. He claims to have premised "the core" of his defense on this "bright line" distinction, attempting to persuade the jury that Woodward and Sawyer's relationship should be found "to fall on the 'friendship' side of the line," because of the family friendship

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expanding the degree of doubt permissible, and consequently such definitions result in increased appellate litigation." United States v. Andujar, 49 F.3d 16, 23 (1st Cir. 1995) (internal quotation marks and alteration omitted). We note that for district courts in this circuit that are inclined to provide further definition for the concept, a reasonably detailed reasonable doubt instruction used by Judge Keeton is set forth verbatim, and expressly approved without qualification, in United States v. Cleveland, 106 F.3d 1056, 1062-63 (1st Cir. 1997), aff'd on other grounds, sub nom., Muscarello v. United States, 118 S. Ct. 1911 (1998).

and the social nature of the functions at which the expenditures were made. Id. at 38.

Woodward's theory of the case is flawed, based on a misreading of our decision in Sawyer. Relationships among human beings, especially among lobbyists and elected officials, will frequently not follow a bright-line pattern, falling on one side or the other of some magical wall dividing friendship from attempts at undue influence. A lobbyist and legislator may initially have an exclusively business relationship when they first meet, but if it continues over time, given the nature of the lobbying business with its sometimes "lavish hospitality," Sawyer, 85 F.3d at 741, the individuals involved may eventually get to know each other, and some may be able to claim, with some truth, that their relationship has become one of friendship. We did not imply anything different in Sawyer,[16] and we certainly did not state or imply what Woodward's theory seems to entail; that the formation of a friendship between a lobbyist and a legislator somehow insulates both from prosecution for honest services fraud.

A look at Sawyer's language illustrates Woodward's error. We stated: "[I]f the aim of the lobbyist were simply to cultivate a business or political 'friendship' with the legislator," then payments for entertainment would not constitute a violation of the Travel Act or the mail or wire fraud statutes. 85 F.3d at 741 (emphasis added) . To so hold - that conduct is not illegal

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[16] Woodward points to our language in Sawyer requiring the district court to "take pains to explain" to the jury the difference between "the merely unattractive and actually criminal conduct." 85 F.3d at 741. But to explain the difference is not the same as to create a bright line test such that a defendant is insulated from criminal liability merely because a legal friendship forms a portion of his intent.

if it is "simply" to cultivate a friendship - does not immunize dual intent conduct. The word "simply" carries the import of "solely." A dual intent that seeks both to cultivate friendship and to illegally influence official acts is not a purpose that is "simply" to promote friendship. Such a dual purpose is not insulated from criminal liability merely because, in Sawyer, we were careful to protect a purpose that is "simply" to promote friendship.

Similarly, in Sawyer we said: "[I]f Sawyer had this limited intent - to cultivate friendship rather than to influence an official act - the federal statutes here involved would not be violated." Id. (emphasis added). An intent "limited" to promoting friendship does not include an intent that also has a second purpose. The words "rather than" - when juxtaposed in this way against the "limited intent" language - imply that an intent to influence cannot be part of one's intent if one seeks the Sawyer immunity.

After discussing an intent limited to the cultivation of business or friendship, Sawyer went on to say that: "Only if instead or in addition, there is an intent to cause the recipient to alter her official acts may the jury find a theft of honest services or the bribery predicate of the Travel Act." Id. at 741 (emphasis added). Woodward's argument addresses the "instead" portion of the disjunctive, but Woodward offers no basis for reading the highlighted words out of our holding in Sawyer. The quoted sentence clearly contemplates, not a "bright line" or "either-or" dichotomy (Def. Br. at 37-38), but the possibility that a defendant may be prosecuted if he possesses a dual intent, an illegal intent "in addition" to a legal "friendship" intent.

Thus, Sawyer's language does not mean what Woodward would like it to mean - that conduct must have an exclusively

illegal intent in order to be subject to the criminal laws. Rather, it means only that conduct may not be subject to the criminal laws if the intent underlying it is exclusively legal. A defendant may be prosecuted for deprivation of honest services if he has a dual intent, i.e., if he is found to have intended both a lawful and an unlawful purpose to some degree. If the jury finds that an unlawful purpose was present, it may convict the defendant.

The Third Circuit reached a similar conclusion in United States v. Greber, 760 F.2d 68, 72 (3d Cir. 1985). As Woodward noted, the jury in Greber "was instructed similarly to the present case, making any amount of inducement, however small, illegal." Def. Br. at 39 n.27; see Greber, 760 F.2d at 72. In United States v. Bay State Ambulance & Hosp. Rental Serv., Inc., 874 F.2d 20 (1st Cir. 1989), we noted that we were "impressed with the Third Circuit's reasoning" in Greber. Bay State, 874 F.2d at 29-30. Likewise, the Second Circuit has "noted that there could be dual purposes for payments, stating that a 'valid purpose that partially motivates a transaction does not insulate participants in an unlawful transaction from criminal liability.' The charge was entirely appropriate in light of [the defendant's] argument that he was motivated by friendship." United States v. Coyne, 4 F.3d 100, 113 (2d Cir. 1993) (rejecting challenge to jury instruction that defendant must be found to have accepted or solicited a thing of value "at least in part" for or because of his intent to be influenced) (citing Biaggi, 909 F.2d at 683); see also Anderson v. United States, 417 U.S. 211, 226 (1974) (conspiracy).

Therefore, the answer to Woodward's assertion that "[t]he district court's instruction should . . . have parroted

Sawyer, "Def. Br. at 38, is that, for all relevant purposes, it did. The district court instructed the jury, inter alia, as follows:

> You may not find that the defendant violated either set of federal laws which I have described to you if his receipt of the expenditures was solely part of a routine cultivation of a business or political friendship rather than an intent on his part to be influenced in his official legislative duties. If instead or in addition, there is an intent on the defendant's part to be influenced in his official legislative duties, then you may find a violation of either set of federal laws. If there is both the intent to cultivate a business and political relationship and the intent to be influenced in official legislative duties, then you may find a violation of the federal laws.

Woodward would have us go beyond Sawyer in the present case. He insists that the real issue here is the degree of unlawful intent necessary[17] in a dual intent case to permit or sustain a conviction, and the necessary jury charge on that point. Woodward argues that the protective instruction we set forth in Sawyer should be modified to say that an illegal purpose must be at least "one of the [scheme's] several dominant purposes," Def. Br. at 40 (quoting United States v. Ellis, 935 F.2d 385 (1st Cir. 1991) (Mann Act)) (emphasis added). Otherwise, under our

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[17] Woodward does not indicate whether the basis of his contention is some constitutional provision, is rooted in the language of the statute itself, or has some other source. Because Woodward states no basis for this "necessity" other than the implication that arises from his argument that Sawyer requires it, we address only the Sawyer issue.

reading of Sawyer, a de minimus illegal intent could result in a conviction even if it were dwarfed by a perfectly legal "friendship" intent.

According to Woodward, the illegal purpose of the gratuity should not be a minor or incidental portion of the mix. We disagree. The criminal law may punish conduct even if its illegal purpose is incidental to other, legal purposes. See Anderson, 417 U.S. at 226 (holding that the purpose to violate federal law may be a secondary purpose, not necessarily primary); United States v. Ellis, 595 F.2d 154, 162 (3d Cir. 1979) ("While [Supreme Court cases] require such a specific intent [to violate constitutional rights], they do not require that the immediate intent to violate constitutional rights predominate over the ultimate purposes which that violation is designed to achieve.").

We will assume nevertheless that Woodward is correct that a conviction should not stand if the illegal intent is de minimus or insignificant, But this does not mean that the district court erred in failing to give an instruction as to the "de minimus" point. The law may require a certain degree of illegal intent in order to convict, but it does not follow that an explicit instruction on that point is necessary. In the present case, even if the instructions were not technically adequate because they lacked an explicit "de minimus" instruction, Woodward was not prejudiced thereby. "An error in jury instructions will warrant reversal of a judgment only if the error is determined to have

been prejudicial, based on a review of the record as a whole."[18] Davet v. Maccarone, 973 F.2d 22, 26 (1st Cir. 1992). As we have already discussed in Part III, there is no evidentiary basis in this record for Woodward's implicit contention that he had no more than a de minimus degree of intent to defraud the public of his honest services. Therefore the omission of explicit "de minimus" language from the jury instructions - even if erroneous - did not prejudice Woodward, and any error does not warrant reversal of his conviction. See Davet, 973 F.2d at 26.

V

Super Bowl Evidence

Woodward appeals the denial of his motion in limine to exclude evidence that Hancock, through Sawyer, paid for a 1986 trip for Woodward and his wife to the Super Bowl in New Orleans. The court permitted the government to introduce evidence concerning the Woodwards' receipt of $1,809 worth of airfare, lodging, and tickets to the game. After admitting such evidence, the court gave a limiting instruction to the jury.

Woodward objects that this particular gratuity involved more money and was different in kind than the gratuities on the basis of which he was convicted: it included payment for airfare and lodging, whereas all other gratuities were limited to meals, golf, and other forms of entertainment. He also points out that the statute of limitations precludes Woodward from being charged with crimes committed prior to July 27, 1990, and that

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[18] Of course, it is reversible error for a trial judge to fail to instruct the jury on every element of the offense necessary for conviction. United States v. DiRico, 78 F.3d 732, 735 (1st Cir. 1996) (citing United States v. Gaudin, 515 U.S. 506, 522-23 (1995)).

18 U.S.C. § 1346 was not even enacted until November 18, 1988. For these reasons, Woodward claims that the admission of the Super Bowl evidence was of limited probative value, and that whatever probative value it did have was substantially outweighed by the danger of unfair prejudice. He argues that it should have been excluded under Fed. R. Evid. 403.

Under Rule 403, "if the evidence brings unwanted baggage, say unfair prejudice or a cognizable risk of confusing the jury, and if the baggage's weight substantially overbalances any probative value, then the evidence must be excluded." United States v. Aguilar-Aranceta, 58 F.3d 796, 800 (1st Cir. 1995) (internal quotation marks omitted). "The damage done to the defense is not a basis for exclusion; the question under Rule 403 is one of unfair prejudice -- not of prejudice alone." United States v. Munoz, 36 F.3d 1229, 1233 (1st Cir. 1994) (internal quotation marks omitted). We review trial court rulings under Rule 403 for abuse of discretion. See United States V. Fulmer, 108 F.3d 1486, 1497 (1st Cir. 1997); Aguilar-Aranceta, 58 F.3d at 800.

We note first that, while Woodward is concerned that this particularly expensive gratuity might prejudice the jury because of its amount, he neglects to mention the coincidence in the timing: the Super Bowl took place shortly after Woodward became chair of the Insurance Committee,[19] which happened to be a position from which he could potentially be of great use to Sawyer and Hancock. The government argues, with some force, that the Super Bowl gratuity, elaborate as it was, established and

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[19] This places it within the time limits of the conspiracy as alleged by the government.

set the tone for the ongoing relationship, i.e., a conspiracy to trade valuable gifts for influence, to deprive Woodward's constituents of his honest services. Once the nature of the relationship was established, ongoing gifts could be given in smaller amounts in order to "keep the wheels greased." Thus, the Super Bowl evidence has a good deal more probative value than Woodward suggests And its prejudicial effect is far less: accepting tickets to the Super Bowl is not so heinous or outrageous that the jury was likely to be inflamed against Woodward and ignore the arguments presented in his defense,[20] thereby risking a conviction based on passion rather than on the evidence. Cf. United States v. Bartelho, 129 F.3d 663, 677-78 (1st Cir. 1997) (affirming admission of plans to escape from prison at trial on bank robbery); Pitrone, 115 F.3d at 7-8 (admitting evidence of defendant's boasting about 40 prior commissions of the same crime); United States v. Rivera, 83 F.3d 542, 545-47 (1st Cir. 1996) (evidence that defendant raped victim admissible at trial on carjacking charge); United States v. Manning, 79 F.3d 212, 217-18 (1st Cir.), cert. denied, 117 5. Ct. 147 (1996) (admitting evidence of prior drug dealing at trial on current drug trafficking charges); United States v. Cruz-Kuilan, 75 F.3d 59, 61 (1st Cir. 1996) (affirming admission of evidence that victim died of gunshot wounds at trial for carjacking); United States v. Lombard, 72 F.3d 170, 190 (1st Cir. 1995) (evidence relating to murder, of which defendant had

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[20] Woodward's argument assumes the jury will also ignore the court's limiting instruction. We, of course, ordinarily presume the jury follows the court's instructions.

previously been acquitted, admitted at trial on firearms violations).

In Sawyer, we noted the district court's decision to admit the same Super Bowl evidence to prove "Sawyer's state of mind with respect to the alleged scheme to defraud." 85 F.3d at 721 n.1. We observed that the court had instructed the jury, as the district court did here, that these events took place prior to the time indictable under the statute of limitations, but that such evidence was probative of the defendant's (there, Sawyer's) state of mind. In Sawyer, we did not address the propriety of admitting this evidence because Sawyer had not challenged it as Woodward has here. In this case, we hold that the district court properly admitted this evidence, to prove Woodward's intent and the nature of the conspiracy.

VI

Conclusion

In this case, the jury instructions adequately conveyed to the jury the difference between conduct that is legal and conduct that violates the criminal laws. The evidence was sufficient to enable a rational jury to conclude beyond a reasonable doubt that Woodward was guilty of the four counts on which he was convicted, and no ground for error has been found. The judgment of the district court is **affirmed.**

APPENDIX B

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Art. I §6.
The Senators and Representatives ... shall in all Cases ... be privileged ... for any Speech or Debate in either House ...
U.S. Const. amend. I.
Congress shall make no law ... abridging the freedom of speech ... or ... the right ... to petition the Government for a redress of grievances.
U.S. Const. amend. XIV.
Nor shall any state deprive any person of life, liberty or property without due process of law ...

18 U.S.C. §371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, ... or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both ...

18 U.S.C. §1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, ... for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, ... or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which

it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both ...

18 U.S.C. §1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both ...

18 U.S.C. §1346. Definition of "scheme or artifice to defraud"

For the purpose of this chapter [18 USCS §§1341 et seq.], the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

	) Criminal No. 95-10234-DPW
UNITED STATES OF AMERICA)	
	) VIOLATIONS:
	)
v.	) 18 U.S.C. §371 (Conspiracy)
	) 18 U.S.C. § 1341 (Mail Fraud)
FRANCIS H. WOODWARD,	) 18 U.S.C. § 1343 (Wire Fraud)
	) 18 U.S.C. § 1346 (Honest
	) Services Mail and Wire
Defendant.	) Fraud)
	) 18 U.S.C. § 1952 (Use of
	) Interstate Travel to Commit Bribery)
	18 U.S.C. § 2 (Aiding and Abetting)

INDICTMENT

The Grand Jury charges that:

The Defendant

At all relevant times, unless otherwise indicated:

1. FRANCIS H. WOODWARD was a member of the Massachusetts House of Representatives from January 1977 to April 1992. From 1985 through January 1991, WOODWARD as the House Chair of the Joint Committee on Insurance of the Massachusetts Legislature.

The Massachusetts Legislature

2. The Massachusetts Legislature, more formally known as the General Court, convened each year at the State House on Beacon Hill in Boston. The Legislature had two chambers, the House of Representatives and the Senate. The

House of Representatives had 160 members and the Senate had 40 members. The citizens of the Commonwealth of Massachusetts elected legislators in November of each even-numbered calendar year for two-year terms, which began the following January. The legislators proposed, studied, debated and voted on bills which, if enacted, became laws of the Commonwealth of Massachusetts.

3. Most laws passed by the House of Representatives and by the Senate were developed through legislative Committees. The House of Representatives and the Senate each had such Committees. In addition, the Legislature had Joint Committees, which included members of both chambers. Each Committee had a chairman, who exercised primary control over that Committee. Joint Committees had a House Chair and a Senate Chair. Committee Chairs controlled the scheduling of when bills were considered by the committee. Committee Chairs and other committee members advanced legislation by supporting and bringing it to a prompt vote of the Committee, and conversely discouraged legislation by opposing it or referring it for "study," which almost always killed the bill for the legislative session. Bills initially referred to a committee had to be approved by that committee (and sometimes other committees) before it was sent to a vote of an entire chamber of the Legislature.

Other Relevant Entities and Individuals

4. John Hancock Mutual Life Insurance Company, Inc. ("Hancock") was the largest insurance company chartered by and headquartered in the Commonwealth of Massachusetts, with assets in excess of $30 billion. Because Hancock was headquartered in Massachusetts, the Commonwealth of Massachusetts and its public officials served as Hancock's primary regulator. Thus, the laws of the Commonwealth of Massachusetts and the Massachusetts Legislature were more important to Hancock

than the laws and the legislature of any other state. Because of the nature of Hancock's business, the Joint Committee on Insurance of the Massachusetts Legislature had particular importance to Hancock.

5. F. William Sawyer ("Sawyer") was a registered legislative agent and the chief lobbyist for hancock in all matters pending before the Massachusetts Legislature. In general, lobbyists represent the interests and advocate the positions of the entities which they represent before the Massachusetts Legislature.

6. The Life Insurance Association of Massachusetts, Inc. ("LIAM") is a trade association of Massachusetts-based commercial life, health and disability insurers. The members of LIAM were Hancock, Massachusetts Mutual Life Insurance Company, New England Life Insurance, State Mutual Life Insurance Company, Paul Revere Life Insurance Company, Boston Mutual Life Insurance Company, Berkshire Life Insurance Company and Liberty Life. LIAM members paid annual dues to support the association's activities. Because of the nature of business of LIAM members, the Joint Committee on Insurance of the Massachusetts Legislature had particular importance to them.

7. Lobbyist "A" was a registered legislative agent and coordinated LIAM's lobbying activities in all matters pending before the Massachusetts Legislature.

8. The State Ethics Commission was a state commission consisting of five commissioners and a staff, with the power and duty to interpret and enforce the laws described in paragraphs 11-15 below. Each year, WOODWARD and all other legislators were required to file a Statement of Financial Interests with the State Ethics Commission in which they were required to list all gifts to themselves and their immediate family members

with an aggregate value of $100 or more in the previous calendar year.

The Duty of Honest Services

9. WOODWARD and all other members of the Massachusetts Legislature owed a duty of honest services to the Commonwealth of Massachusetts and its citizens. This duty of honest services included a fiduciary obligation as employees to perform their jobs as members of the Massachusetts Legislature free from deceit, fraud, dishonesty, conflict of interest and self-enrichment. In addition to this general duty of honest services, legislators were required to abide by the laws of the Commonwealth of Massachusetts, including a specific duty to abide by the laws and rules set forth below.

Summary of the Relevant Laws

10. At all relevant times, Massachusetts law strictly limited the dollar value of the travel, lodging, golf, meals, tickets and other entertainment or things of value which WOODWARD and other legislators could receive. These laws are described in paragraphs 11-15 below.

The Laws Prohibiting and Otherwise Limiting Gratuities

11. It was a violation of Chapter 268A, Massachusetts General Laws, Section 3(b), for WOODWARD or any other legislator to accept or receive anything of "substantial value" from any person or entity for or because of any official act of that legislator or act within that legislator's official responsibility.

12. It was a violation of Chapter 268B, Massachusetts General Laws, Section 6, for WOODWARD or any other legislator or member of any legislator's immediate family to accept gifts with an aggregate value of $100 or more in a calendar year from any legislative agent.

13. It was a violation of Chapter 268A, Massachusetts General Laws, Section 23(b)(3), for WOODWARD or any other legislator to act knowingly, or with reason to know, in a manner which would cause a reasonable person having knowledge of the relevant circumstances to conclude that anyone could improperly influence or unduly enjoy his favor in the performance of his official duties.

14. In addition to the above restrictions, the provisions of Chapter 268B, Massachusetts General Laws, Section 5, strictly required WOODWARD to file with the State Ethics Commission a Statement of Financial Interests listing gifts to him or his immediate family with an aggregate value of $100 or more in the previous calendar year from any source. WOODWARD failed to report any of the gifts and gratuities he received from Sawyer, Lobbyist "A", Hancock and LIAM.

The House of Representatives Rule Limiting Gratuities

15. From January 1985 to the present, it was a violation of Rule 16-A of the Rules of the House of Representatives, the Code of Ethics, for WOODWARD to receive gifts with an aggregate value of $100 or more in any calendar year from any legislative agent.

16. After each election, at the start of the next legislative term, WOODWARD and all other members of the Massachusetts House of Representatives took an oath in which they swore to uphold the laws of the Commonwealth of Massachusetts and the Rules of the House of Representatives. The Rules of the House of Representatives which WOODWARD swore to uphold included the Code of Ethics.

Count One: (18 U.S.C. § 371- Conspiracy)

The Grand Jury further charges that:

17. The allegations contained in paragraphs 1-16 of this Indictment are realleged as though fully set forth herein.

18. From no later than January 1984 until at least April 1992, at Boston, Auburndale, Hyannis and elsewhere in the District of Massachusetts; in New Orleans, Louisiana; Nashville, Tennessee; Tampa, Florida; Newport, Rhode Island; Palm Springs, California; Tuscon, Arizona; Tulsa, Oklahoma; Orlando, Florida; Savannah, Georgia; Hilton Head, South Carolina; Scottsdale, Arizona; and at other locations known and unknown to the Grand Jury,

FRANCIS H. WOODWARD

defendant herein, did knowingly, willfully and intentionally combine, conspire and agree, with others known and unknown to the grand jury, to commit various offenses against the United States, to wit:

(a) The defendant devised and intended to devise a scheme and artifice to defraud the commonwealth of Massachusetts and its citizens of their right to his honest services as a member of the massachusetts Legislature, and for the purpose of executing such scheme and artifice caused items to be sent and delivered by the United States Postal Service, according to the directions thereon, in violation of 18 U.S.C. §§ 1341 and 1346; and

(b) The defendant devised and intended to devise a scheme and artifice to defraud the Commonwealth of Massachusetts and its citizens of their right to his honest services as a member of the Massachusetts Legislature, and for the purpose of executing such scheme and artifice transmitted and caused to be transmitted by means of wire

in interstate commerce signals and sounds, i.e., interstate telephone calls, in violation of 18 U.S.C. §§ 1343 and 1346; and

(c) The defendant traveled and caused others to travel in interstate commerce, used the mails and facilities in interstate commerce, and caused others to use the mails and facilities in interstate commerce, with intent to promote, carry-on and facilitate the promotion and carrying on of unlawful activity, to wit: bribery, in violation of Chapter 268A, Massachusetts General Laws, Section 3, and after such travel and use of mails and facilities in interstate commerce performed and attempted to perform acts of bribery in violation of Chapter 268A, Massachusetts General Laws, Section 3, in violation of 18 U.S.C. §1952.

Means and Methods of the Conspiracy

19. It was part of the conspiracy that, between 1984 and 1992, WOODWARD accepted from individuals representing Hancock and LIAM, including Sawyer, Lobbyist "A" and others, travel, lodging, golf, meals, tickets and other entertainment and benefits, in violation of his duty of honest services to the Commonwealth of Massachusetts and its citizens and in violation of the laws of the Commonwealth of Massachusetts and rules described above.

20. It was further part of the conspiracy that, for each year between 1984 and 1992, WOODWARD filed false Statements of Financial Interests under oath, in which he unlawfully failed to report to the State Ethics Commission his receipt of the aforesaid travel, lodging, golf, meals, tickets and other entertainment and benefits, in violation of Chapter 268B, Massachusetts General Laws, Section 5.

21. It was further part of the conspiracy that, from 1984 through January 1991, Sawyer on behalf of Hancock and LIAM was given greater access to the Insurance Committee and to WOODWARD as House Chair of the Insurance Committee than was available generally to citizens of the Commonwealth of Massachusetts.

22. It was further part of the conspiracy that, from 1984 through 1990, WOODWARD repeatedly performed official acts on behalf of Hancock and LIAM.

Overt Acts

23. In furtherance of the conspiracy, the defendant committed various overt acts, including but not limited to the following:

a. From no later than January 1984 through April 1992, WOODWARD accepted and received from Sawyer and Hancock illegal gratuities, including but not limited to travel, lodging, golf, meals, tickets and other entertainment and benefits. Among the illegal gratuities WOODWARD received was a trip on or about January 24, 1986, when WOODWARD and Sawyer traveled from Massachusetts to the Super Bowl in New Orleans, Louisiana, where WOODWARD received from Sawyer illegal gratuities, including but not limited to airfare, hotel accommodations, meals and Super bowl tickets.

b. From no later than July 1989 through April 1992, WOODWARD accepted and received from Lobbyist "A" and LIAM illegal gratuities, including but not limited to meals and tickets.

c. For each year from 1984 through 1992, WOODWARD knowingly filed a false Statement of Financial Interests with the State Ethics Commission in which he stated under oath that he and his immediate family members had received

nothing in the preceding calendar year with an aggregate value of $100 or more from any source and in which he failed to disclose the benefits he received from Sawyer, Lobbyist "A", Hancock, and LIAM.

All in violation of Title 18, United States Code, Section 371.

Counts 2 Through 8: (18 U.S.C. §§1341 and 1346 Honest Services Mail Fraud)

The Grand Jury further charges that:

The Mail Fraud Scheme

24. The allegations contained in paragraphs 1-23 of this Indictment are realleged as though fully set forth herein.

25. From no later than January 1984 until at least April 1992, in the District of Massachusetts and elsewhere, the defendant,

FRANCIS H. WOODWARD

and representatives of insurance company interests, including Sawyer, Lobbyist "A" and others, knowingly and willfully devised and executed a scheme and artifice to defraud the Commonwealth of Massachusetts and its citizens of their right to the honest services of members of the Massachusetts Legislature, performed free from deceit, fraud, dishonesty, conflict of interest and self-enrichment.

Means and Methods of the Scheme

26. The means and methods of the scheme include the same means and methods employed by the defendant and others in the conspiracy charged in Count One of this Indictment. As such, paragraphs 19-22 of this indictment are realleged as if fully set forth herein.

Executions of the Mail Fraud Scheme

27. On or about the dates listed below, in the District of Massachusetts, the defendant,

FRANCIS H. WOODWARD

for the purpose of executing the above-described scheme to defraud, knowingly caused the items listed below to be sent and delivered by the United States Postal Service, according to the directions thereon:

Count	Date	Mailed From	Mailed To	Item
2	3/6/91	Boston, MA	Francis H. Woodward Walpole, MA	American Airlines ticket for trip to Savannah, GA
3	8/14/90	Boston, MA	Attorney Hyannis, MA	Letter and check for golf at Hyannisport Country Club
4	12/20/90	Sioux Falls, SD	F. William Sawyer Waltham, MA	Citibank Visa bill reflecting expenses incurred in Orlando, FL and Lake Buena Vista, FL
5	4/22/91	Sioux Falls, SD	F. William Sawyer Waltham, MA	Citibank Visa bill reflecting expenses incurred in Hilton Head, SC and Savannah, GA

6	11/22/91	Sioux Falls, SD	F. William Sawyer Waltham, MA	Citibank Visa bill reflecting expenses incurred in Scottsdale, AZ, and for expenses at Cranberry Moose Restaurant, Yarmouth-port, MA
7	12/22/91	Greensboro, NC	F. William Sawyer Waltham, MA	American Express bill reflecting expenses incurred in Scottsdale, AZ
8	12/2/91	Phoenix, AZ	Lobbyist "A" Boston, MA	American Express bill reflecting expenses incurred in Scottsdale, AZ

All in violation of Title 18, United States Code, Sections 1341, 1346 and 2.

Counts 9 Through 13: (18 U.S.C. §§ 1343 and 1346 Honest Services Wire Fraud)

The Grand Jury further charges that:

The Wire Fraud Scheme

28. The allegations contained in paragraphs 1-28 of this Indictment are reallaged as though fully set forth herein.

29. From no later than January 1984 until at least April 1992, in the District of Massachusetts and elsewhere, the defendant,

FRANCIS H. WOODWARD

and representatives of insurance company interests, including Sawyer and others, knowingly and willfully devised and executed a scheme and artifice to defraud the Commonwealth of Massachusetts and its citizens of their right to the honest services of members of the Massachusetts Legislature, performed free from deceit, fraud, dishonesty, conflict of interest and self-enrichment.

Means and Methods

30. The means and methods of the scheme include the same means and methods employed by the defendant and others in the conspiracy charged in Count One of this Indictment and in the mail fraud scheme charged in Counts Two through Eight of this Indictment. As such, paragraphs 19-22 and paragraph 26 of this Indictment are realleged as if fully set forth herein.

Executions of the Wire Fraud Scheme

31. On or about the dates set forth below, in the District of Massachusetts, the defendant,

FRANCIS H. WOODWARD

for the purpose of executing the above-described scheme to defraud, knowingly caused to be transmitted by means of wire in interstate commerce signals and sounds, to wit: the following telephone calls:

Count	Date	Origin of Call	Place Called	Purpose of Call
9	11/21/90	Boston, MA	Lake Buena Vista, FL	Arrangements related to entertainment in Florida
10	3/14/91	Boston, MA	Savannah, GA	Hotel arrangements related to entertainment in Georgia
11	3/14/91	Boston, MA	Savannah, GA	Restaurant arrangements related to entertainment in Georgia
12	3/20/91	Boston, MA	Hilton Head Island, SC	Arrangements related to entertainment in South Carolina
13	11/15/91	Boston, MA	Scottsdale, AZ	Arrangements related to entertainment in Arizona

All in violation of Title 18, United States Code, Sections 1343, 1346 and 2.

Counts 14 Through 28: (18 U.S.C. § 1952 - Use of Interstate Travel to Commit Bribery)

The Grand Jury further charges that:

32. The allegations contained in paragraphs 1-23 of this Indictment are realleged as though fully set forth herein.

33. On or about the dates set forth below, in the District of Massachusetts and elsewhere, the defendant,

FRANCIS H. WOODWARD

acting in concert and in furtherance of the conspiracy described above in Count One, did knowingly and willfully travel and cause others to travel in interstate commerce from the District of Massachusetts to the places set forth below, and did knowingly and willfully use the mails and facilities in interstate commerce and cause others to use the mails and facilities in interstate commerce as set forth below, with the intent to promote and carry on, and facilitate the promotion and carrying on of, unlawful activity, to wit: bribery in violation of Chapter 268A, Massachusetts General Laws, Section 3, and thereafter, following each such act of travel and use of mails and facilities in interstate commerce set forth below, the defendant performed and caused to be performed acts of bribery in violation of Chapter 268A, Massachusetts General Laws, Section 3:

Travel

Count	Date	Destination
14	November 28, 1990	Orlando, Florida
15	March 20, 1991	Savannah, Georgia
16	November 14, 1991	Scottsdale, Arizona

Use of Mails

Count	Date	Mailed From	Mailed To	Item
17	3/6/91	Boston, MA	Francis H. Woodward Walpole, MA	American Airlines ticket for trip to Savannah, GA
18	8/14/90	Boston, MA	Attorney Hyannis, MA	Letter and check for golf at Hyannisport Country Club
19	12/20/90	Sioux Falls, SD	F. William Sawyer Waltham, MA	Citibank Visa bill reflecting expenses incurred in Orlando, FL and Lake Buena Vista, FL
20	4/22/91	Sioux Falls, SD	F. William Sawyer Waltham, MA	Citibank Visa bill reflecting expenses incurred in Hilton Head, SC and Savannah, GA

21	11/22/91	Sioux Falls, SD	F. William Sawyer Waltham, MA	Citibank Visa bill reflecting expenses incurred in Scottsdale, AZ and for expenses at Cranberry Moose Restaurant, Yarmouth-port, MA
22	12/22/91	Greensboro, NC	F. William Sawyer Waltham, MA	American Express bill reflecting expenses incurred in Scottsdale, AZ
23	12/2/91	Phoenix, AZ	Lobbyist "A" Boston, MA	American Express bill reflecting expenses incurred in Scottsdale, AZ

Use of Facilities
(Telephone Calls)

Count	Date	Origin of Call	Place Called	Purpose of Call
24	11/21/90	Boston, MA	Lake Buena Vista, FL	Arrangements related to entertainment in Florida
25	3/14/91	Boston, MA	Savannah, GA	Hotel arrangements related to entertainment in Georgia
26	3/14/91	Boston, MA	Savannah, GA	Restaurant arrangements related to entertainment in Georgia
27	3/20/91	Boston, MA	Hilton Head Island, SC	Arrangements related to entertainment in South Carolina
28	11/15/91	Boston, MA	Scottsdale, AZ	Arrangements related to entertainment in Arizona

All in violation of Title 18, United States Code, Sections 1952 and 2.

A TRUE BILL

_____

Foreperson of the Grand Jury

_____

Assistant United States Attorney

DISTRICT OF MASSACHUSETTS: July 27, 1995

Returned into the District Court by the Grand Jurors and filed.

_____

Deputy Clerk

APPENDIX D

DECISIONS INVOLVING DEPRIVATION OF THE INTANGIBLE RIGHT TO HONEST SERVICES BY PUBLIC OFFICIALS

I. PROSECUTIONS UNDER 18 U.S.C. §1346

- U.S. v. Evans, 148 F.3d 477, 1998 U.S. App. LEXIS 16957 at *5-6 (5th Cir. July 24, 1998) (state parole officer received bribes of cash and drugs in return for allowing parolee to violate conditions)

- U.S. v. Reece, 1998 U.S. App. LEXIS 5088 at *2 (4th Cir. March 17, 1998) (ATF official rigged bidding procedures to ensure that businesses he secretly controlled were awarded airplane leasing contracts).

- U.S. v. Brumley, 116 F.3d 728, 734 (5th Cir.) (hearing attorney with adjudicatory authority for state workers' compensation board received "loans" from attorneys who had cases before him) cert. denied 118 S. Ct. 625 (1997).

- U.S. v. Lopez-Lukis, 102 F.3d 1164, 1165 (11th Cir. 1997) (member of Board of County Commissioners sold votes to lobbyist and took steps to ensure that majority of Commissioners voted for projects favored by lobbyist).

- U.S. v. Paradies, 98 F.3d 1266, 1275 (11th Cir. 1996) (member of city council received cash payments for votes on issues before committee, also failed to disclose ownership interest in company receiving benefits of his actions) cert. denied 117 S.Ct. 2483 (1997).

- U.S. v. Grandmaison, 77 F.3d 555, 567 (1st Cir. 1996) (member of Board of Aldermen secretly lobbied other members and gave gratuities in attempt to secure contract for his employer).

- U.S. v. Bryan, 58 F.3d 933, 937 (4th Cir. 1995) (director of state lottery rigged bidding processes to award state lottery advertising and video lottery contracts).

- U.S. v. Waymer, 55 F.3d 564, 568 (11th Cir. 1995) (member of Atlanta Board of Education failed to fully disclose relationship with contractor awarded public school service contract, unbeknownst to other board members, defendant received fifteen percent kickback), cert. denied, 116 S.Ct. 1350 (1996).

- U.S. v. Evans, 30 F.3d 1015, 1015 (8th Cir. 1994) (insurer convicted for giving state insurance regulator kickback for promoting its surety bonds).

- U.S. v. Alkins, 925 F.2d 541, 549 (2d Cir. 1991) (state Department of Motor Vehicles employees secretly processed licenses and registration in return for monetary disbursements).

- U.S. v. Bolden, 1997 U.S. Dist. LEXIS 12252, *2-3 (N.D. Ill. August 14, 1997) (City Water Commissioner indicted for accepting bribes in return for allowing creators of music video access to purification facility).

- U.S. v. Ferber, 966 F. Supp. 90, 95-96 (D. Mass. 1997) (financial advisor to public clients gave unfair advantage to investment banking firm in effort to obtain financial or business advantage, failed to disclose conflict of interest to public entity).

- U.S. v. Frega, 933 F. Supp. 1536, 1538 (S.D. Cal. 1996) (state court judges received gifts from attorney with understanding that they would be corruptly influenced in cases they presided over in which giver was counsel of record).

II. PROSECUTIONS INVOLVING CONDUCT OCCURRING PRIOR TO ENACTMENT OF 18 U.S.C. §1346

- Borre v. U.S., 940 F.2d 215, 216-17 (7th Cir. 1991) (defendant accepted share of bribe taken by Mayor, in exchange for concealing Mayor's ownership interest in company seeking town franchise approval).

- U.S. v. Walgren, 885 F.2d 1417, 1419-20 (9th Cir. 1989) (state congressional majority leader accepted bribes, promising to support legalization of gambling bill).

- U.S. v. Runnels, 877 F.2d 481, 492 (6th Cir. 1989) (president of union took bribes in return for channeling business to attorney, by encouraging union members to file workers' compensation claims).

- U.S. v. Stoneman, 870 F.2d 102, 104 (3rd Cir. 1989) (scheme to obtain contracts for recovery of overpaid social security taxes from state and local entities by bribing public officials), cert. denied, 493 U.S. 891 (1989).

- U.S. v. Asher, 854 F.2d 1483, 1484 (3rd Cir. 1988) (scheme by public officials to accept bribes in return for award of contract to recover overpaid social security taxes).

- United States v. Holzer, 816 F.2d 304, 307 (7th Cir.) *vacated* 484 U.S. 807 *rev'd* 840 F.3d 1343 (7th Cir. 1988) (failure of judge who received bribes from lawyer appearing before him to reveal conflict of interest).

- U.S. v. Silvano, 812 F.2d 754, 755-57 (1st Cir. 1987) (mail fraud conviction of city budget director who schemed to have city insurance contract awarded to firm in which friend had significant interest).

- U.S. v. Lovett, 811 F.2d 979, 984 (bribing mayor to secure cable television contract deprived citizens of their right to impartial services).

- U.S. v. Bruno, 809 F.2d 1097, 1099-1101 (5th Cir. 1987) (defendant involved in scheme to secure money from prisoner's parents in a plan to use the money to bribe prosecutors or the judge sitting in the prisoner's criminal case).

- U.S. v. Gray, 790 F.2d 1290, 1294-96 (6th Cir. 1986) (de facto public officials agreed to purchase workmens' compensation insurance policy in return for promise of kickback) rev'd sub nom McNally v. U.S., 485 U.S. 350 (1987).

- U.S. v. Murphy, 768 F.2d 1518, 1530 (7th Cir. 1985) (state court judge accepted bribes to fix cases).

- U.S. v. Margiotta, 688 F.2d 108, 112 (2d Cir. 1982) (unelected party official who extracted kickbacks from state insurance contractors defrauded citizens their right to honest services by failing to disclose conflict of interest) .

- U.S. v. Sedovic, 679 F.2d 1233, 1234 (8th Cir. 1982) (City License auditor took bribes to help business obtain fraudulent business licenses by conducting phony tax audits).

- U.S. v. Barber, 668 F.2d 778, 781 (4th Cir. 1982) (Alcoholic Beverage Control Commissioner orchestrated system to procure free liquor and accepted bribes by alcohol companies).

- U.S. v. Diggs, 613 F.2d 988, 990 (D.C. Cir. 1979) (congressman's scheme to extract kickbacks from salaries paid to staffers constituted deprivation of honest services).

- U.S. v. Mandel, 591 F.2d 1347, 1350 (4th Cir. 1980) aff'd 602 F.2d 653 (1979) (governor intervened to help cause awarding of additional racing days to a racetrack, the owners of which had arranged for him to receive a non-interest bearing

loan and to acquire stock at bargain price in a corporation they controlled).

- U.S. v. Brown, 540 F.2d 365, 368-70 (8th Cir. 1976) (city building commissioner who, in exchange for rent payments, manipulated bid process for demolition projects to benefit associate).

- U.S. v. Rauhoff, 525 F.2d 1170, 1170-71 (7th Cir. 1975) (individuals involved in scheme to bribe Illinois Secretary of State to award exclusive license plate contract).

- U.S. v. Keane, 522 F.2d 534, 538 (7th Cir. 1975) (defendant alderman and chairman of city finance commission used position to secure preferential treatment for property in which he maintained undisclosed interest and voted on certain matters affecting that property).

- U.S. v. Bush, 522 F.2d 641, 643-46 (7th Cir. 1975) (conviction of city Director of Public Relations based on his failure to disclose to other city officials his ownership of a company bidding for city projects, as well his subsequent efforts to conceal that fact).

- U.S. v. Barrett, 505 F.2d 1091, 1104 (7th Cir. 1974) (county clerk responsible for obtaining insurance on voting machines received secret commissions).

- U.S. v. Isaacs, 493 F.2d 1124, 1150 (7th Cir. 1974) (governor exerted special influence and bestowed special treatment when accepting bribes for setting racing dates).

- Bradford v. U.S., 129 F.2d 274, 276 (5th Cir. 1942) (city finance commissioner used office and political influence to sell motor buses to city at higher price in return for payment of bribe to him).

- Steiner v. U.S., 134 F.2d 931, 933 (5th Cir. 1943) (scheme by Tax Commissioner to accept kickbacks in return for

providing state tax assessment reductions defrauded state of right to honest services).

- Shushan v. United States, 117 F.2d 110, 114-15 (5th Cir. 1941) (scheme by president of Levee Board and member of finance committee to corruptly influence governor and to urge Levee board to accept plan for bond refinancing in return for payment of money).

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No. 98-462

In the Supreme Court of the United States

OCTOBER TERM, 1998

FRANCIS H. WOODWARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's mail and wire fraud convictions.

2. Whether the district court properly instructed the jury on the intent required for conviction on the fraud charges.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-56a) is reported at 149 F.3d 46.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1998. The petition for a writ of certiorari was filed on September 17, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of mail fraud, in violation of 18 U.S.C. 1341; wire fraud, in violation of 18 U.S.C. 1343; interstate travel to commit bribery, in violation of 18 U.S.C. 1952;

and conspiracy to commit those offenses, in violation of 18 U.S.C. 371. The district court sentenced petitioner to six months' imprisonment, to be followed by two years' supervised release, and imposed a fine of $5000. The court of appeals affirmed. Pet. App. 1a-56a; Gov't C.A. Br. 3.

1. From January 1977 until April 1992, petitioner was a member of the Massachusetts House of Representatives. From January 1985 to January 1991, he served as the House Chair of the state legislature's Joint Committee on Insurance. Together with the Senate Chair, petitioner supervised the staff of the Insurance Committee and scheduled all hearings and meetings. He had the authority to assign bills to the hearing calendar and subsequent executive sessions, and to take other actions that would help advance bills through the committee. Petitioner also had considerable influence over the ultimate disposition of a bill, including the ability both to "carry" a bill through the legislative process by advocating or leading the debate for the bill, and to send a bill to "study," which would effectively shelve it. Pet. App. 2a, 4a & n.1; Gov't C.A. Br. 3-4.

William Sawyer was a lobbyist for the John Hancock Mutual Life Insurance Company (Hancock), one of the two largest life insurance companies in Massachusetts. From 1984 to 1992, petitioner accepted approximately $8700 in gratuities from Sawyer, for which Sawyer was then reimbursed by Hancock. Sawyer's expenditures on behalf of petitioner consisted mainly of payments for meals, golf outings, and other entertainment both at conferences—sponsored by the National Conference of Insurance Legislators (COIL), a national association of state legislators involved in insurance matters—and in Massachusetts. The gratuities offered by Hancock to

petitioner increased when he ascended to the position of House Chair of the Insurance Committee. Those gratuities remained at high levels throughout his chairmanship and through 1991, the year he left his position as co-chair. In 1992, the year petitioner resigned from office, he received a mere $16 in gratuities from Hancock. Pet. App. 2a-3a, 5a-8a; Gov't C.A. Br. 4-8.

During his tenure as House Chair of the Insurance Committee, petitioner met with Sawyer approximately three times a week when the legislature was in session. Petitioner consistently took official actions that promoted the interests of Hancock and the life insurance industry. Insurance Committee research director Robert Smith stated that petitioner was the most pro-life-insurance-industry chair during Smith's ten-year tenure. For example, in 1989 a bill opposed by Hancock would have required mandatory discounts on life insurance for non-smokers. After the bill received a favorable recommendation from the Insurance Committee based on the support of the Senate Chair, petitioner led the opposition to the bill in debate before the full House of Representatives, ultimately defeating the bill. Petitioner also repeatedly led the Insurance Committee to support and report favorably bills proposed by the insurance industry and then pushed those bills through the legislative process. Pet. App. 8a, 25a; Gov't C.A. Br. 8-11.

Massachusetts law required petitioner to file a yearly Statement of Financial Interests (SFI) with the Massachusetts State Ethics Commission. Pet. App. 29a-30a; see Mass. Gen. Laws Ann. ch. 268B, § 5 (West 1992 & Supp. 1998). Petitioner was required to disclose on his SFI forms gifts with an aggregate value greater than $100 that he received from lobbyists or businesses that had a direct interest in legislation. Petitioner did not

disclose any of the gratuities received from Hancock on his SF1 forms for the years 1984 through 1992. Pet. App. 30a; Gov't C.A. Br. 12-15.

After petitioner left the legislature, he asked Sawyer to help him obtain employment as a lobbyist with Hancock. Sawyer, however, told petitioner that he lacked the necessary experience for the job. In a conversation with Smith, petitioner expressed disappointment at Sawyer's unwillingness to help him. Smith stated that petitioner told him: "After all I did for Bill Sawyer, you know, I can't believe he's not—he can't get me a job." Petitioner complained to Smith that "you would think after all the years and everything I've done I would be treated better than I have been treated." Petitioner also reported to Smith that he had told Sawyer that "[i]f he [petitioner] could not get the job himself he'd like to see his son Brian get the job." Pet. App. 21a-24a; Gov't C.A. Br. 11-12.

2. A federal grand jury returned a 28-count indictment charging petitioner with conspiracy, in violation of 18 U.S.C. 371; multiple counts of mail and wire fraud, in violation of 18 U.S.C. 1341, 1343, 1346; and multiple counts of interstate travel to commit bribery, in violation of 18 U.S.C. 1952. Pet. App. 59a-77a. The mail and wire fraud counts alleged a scheme to defraud the Commonwealth of Massachusetts and its citizens of their right to petitioner's honest services as a state legislator.[1] The indictment charged that in furtherance

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[1] The mail and wire fraud statutes, 18 U.S.C. 1341, 1343, proscribe mailings and wire transmissions in furtherance of "any scheme or artifice to defraud." In *McNally* v. *United States*, 483 U.S. 350 (1987), this Court held that Section 1341 was "limited in scope to the protection of property rights" and did not criminalize schemes "designed to deprive individuals, the people, or the government of intangible rights." *Id.* at 358, 360. The following year,

of this scheme, petitioner accepted illegal gratuities from individuals representing Hancock and the insurance industry trade association, that he filed false SFI forms in which he unlawfully failed to report his receipt of those gratuities, and that he repeatedly performed official acts on behalf of Hancock and the trade association. Pet. App. 10a, 64a-72a.

At trial, the district court instructed the jury that in order to convict petitioner on the fraud counts, the government was required to prove beyond a reasonable doubt that petitioner acted with intent to defraud. 10/1/96 Tr. 98-99; Gov't C.A. Br. 40. The court instructed that such intent "means to act knowingly and with a specific intent to deceive for the purpose either of causing a loss to another or bringing about gain to one's self or for both of those purposes." 10/1/96 Tr. 98-99; Gov't C.A. Br. 40-41. Further, the court stated that to prove intent to defraud the government was required to show petitioner's "lack of good faith * * * beyond a reasonable doubt." 10/1/96 Tr. 109-110; Gov't C.A. Br. 41. The district court warned the jurors that "unattractive or reprehensible" behavior in the relationship between legislators and lobbyists does not constitute a violation of federal law. 10/1/96 Tr. 95. "The focus here is on the intent of the defendant to accept a gratuity, actually to influence his official duties, to cause him to depart from his duty to act as a disinterested legislator or legislative decision-maker."

Congress enacted 18 U.S.C. 1346, which provides that, for purposes of the mail fraud and wire fraud statutes, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4508.

Id. at 101. The court also gave the following instruction:

> You may not find that the defendant violated either set of the federal laws, which I have described to you, if his receipt of the expenditures was solely part of a routine cultivation of a business or political friendship rather than an intent on his part to be influenced in his official legislative duties. If, instead or in addition, there is an intent on the defendant's part to be influenced in his official legislative duties, then you may find a violation of either set of federal laws. If there is both the intent to cultivate a business and political friendship and the intent to be influenced in official legislative duties, then you may find a violation of the federal laws.[2]

Id. at 128; Gov't C.A. Br. 41. The court then reminded the jurors that "you're not to be concerned with whether or not it is unattractive for lobbyists and legislators to have a close personal friendship," and cautioned them that "[p]ayments for entertainment, lodging, golf, sports events and the like cannot serve as the basis for the federal violations if the aim is limited to

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[2] That instruction was derived from the court of appeals' decision in *United States* v. *Sawyer*, 85 F.3d 713 (1st Cir. 1996), in which William Sawyer—the same Hancock lobbyist—had appealed his convictions for mail and wire fraud, as well as interstate travel to commit bribery. The court of appeals reversed Sawyer's convictions based in part on the district court's failure to instruct the jury that a lobbyist who provides gratuities to a public official "has not violated the bribery component of the Travel Act (or committed honest services fraud) if his intent was limited to the cultivation of business or political friendship." *Id.* at 741. The court explained that "[o]nly if instead or in addition, there is an intent to cause the recipient to alter her official acts may the jury find" a violation of those federal statutes. *Ibid.*

the cultivation of a business or political friendship." 10/1/96 Tr. 128-129; Gov't C.A. Br. 41-42.

The jury found petitioner guilty on the conspiracy count (Count 1), one mail fraud count (Count 4), one wire fraud count (Count 9), and two Travel Act counts (Counts 14 and 24),[3] and acquitted petitioner on all remaining counts. Pet. App. 9a & n.4.

3. The court of appeals affirmed. Pet. App. 1a-56a. Petitioner challenged the sufficiency of the evidence to sustain his fraud convictions, claiming that the evidence was insufficient to prove that he accepted the gratuities with the intent to deprive the public of his honest services. *Id.* at 15a. The court of appeals rejected that claim, finding that evidence concerning the circumstances of petitioner's relationship with Sawyer supported the jury's finding that petitioner "knew what the deal was—that the gratuities would continue as long as he voted favorably to Hancock's interests—and that he intended to be influenced by the gratuities." *Id.* at 19a (citation omitted). The court noted one instance in which Sawyer departed from a conference early but left his credit card behind to pay for petitioner's golf and meal expenses during the remainder of the conference. The court found that that arrangement was "not consistent with mere friendship as the sole purpose of the payments, but rather is more consistent with the theory of a gratuity made because of [petitioner's] potential official actions." *Ibid.* The court of appeals further noted that "[t]he same inference can be drawn from the fact that the expenditures were not mutual but rather operated in one direction only." *Id.*

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[3] The district court granted a post-trial motion for judgment of acquittal on Count 24, ruling that it was multiplicitous with Count 9. Pet. App. 9a n.4; Gov't C.A. Br. 3.

at 20a. The court also remarked that the government presented direct evidence of petitioner's illegal intent, including his statements to Smith concerning his efforts to persuade Sawyer to assist him in obtaining employment with Hancock. *Id.* at 21a-24a. In addition, the court found that the jury's verdict was supported by evidence of the extent to which petitioner's discretionary official actions served the interests of Hancock and the insurance industry. *Id.* at 24a-29a.

Petitioner also argued that the evidence was insufficient to support his wire fraud conviction because the telephone call that formed the basis of that conviction was not made "for the purpose of executing" the fraudulent scheme. Pet. App. 32a; see 18 U.S.C. 1343. The telephone call charged in the indictment was placed by a Hancock employee to a hotel in Orlando, Florida, to reserve a hotel room so that Sawyer could attend a COIL conference in that city. Pet. App. 33a. The court of appeals held that "[t]he jury could reasonably have concluded that the call was made in furtherance of the scheme to defraud." *Id.* at 34a. The court reasoned that in order to provide petitioner with illegal gratuities at the COIL conference, Sawyer needed to secure a hotel room in which to stay during the conference. Because "[t]he call in question secured that room," the court stated, it "played an essential role in the scheme." *Ibid.*

Likewise, the court rejected petitioner's argument that the government had failed to prove that the mailing alleged in the mail fraud count was made in furtherance of the scheme to defraud. Pet. App. 35a-37a. The use of the mails on which petitioner's conviction was predicated was Citibank Visa's mailing of a bill to Sawyer for charges arising from his use of his Visa card to pay for gratuities given to petitioner. *Id.* at 35a-36a.

Petitioner claimed that because the mailing took place several weeks after Sawyer purchased those meals and entertainment for petitioner, the fraudulent scheme "had already reached fruition by the time the mails were used." *Ibid.* The court of appeals disagreed, noting that petitioner mistakenly "assume[d] a new fraudulent scheme began and ended every time Sawyer used his credit card to pick up the tab" for petitioner. *Id.* at 36a. On the contrary, the court stated, "the evidence supported the conclusion that the fraudulent scheme in which [petitioner] and Sawyer participated was an ongoing scheme, lasting for years and involving Sawyer's use of his credit card." *Ibid.* The court concluded that it was "a necessary part of the ongoing scheme that Sawyer pay his bill after receiving it in the mail." *Ibid.*

Petitioner also argued that the district court erred in instructing the jury that it could find him guilty on the fraud charges if it found that, in accepting the gratuities from Sawyer, he intended both to cultivate his friendship with the lobbyist and to be influenced in his official duties. Pet. App. 46a-48a. The court of appeals held that the district court's instruction accorded with its prior decision in *United States* v. *Sawyer*, 85 F.3d 713 (1st Cir. 1996) (Pet. App. 48a-51a), rejecting petitioner's suggestion that *Sawyer* held that "the formation of a friendship between a lobbyist and a legislator somehow insulates both from prosecution for honest services fraud." *Id.* at 48a. Instead, the court explained, "[a] defendant may be prosecuted for deprivation of honest services if * * * he is found to have intended both a lawful and an unlawful purpose to some degree." *Id.* at 50a.

The court also rejected petitioner's contention that the district court should have instructed the jury that it

could not convict him if it found that his illegal intent was "*de minimus* [*sic*] or insignificant," reasoning that "[t]he criminal law may punish conduct even if its illegal purpose is incidental to other, legal purposes." Pet. App. 52a. In any event, the court found "no evidentiary basis" for petitioner's "implicit contention that he had no more than a *de minimus* degree of intent to defraud the public of his honest services." *Id.* at 53a. Thus, the court held, any error in the district court's "omission of explicit '*de minimus*' language from the jury instructions" was harmless. *Ibid.*

ARGUMENT

1. Petitioner raises two challenges (Pet. 7-16, 21-25) to the sufficiency of the evidence to support his mail and wire fraud convictions. Neither claim warrants this Court's review.

a. First, petitioner argues (Pet. 7-16) that the evidence was insufficient because the government failed to prove a "direct link" (Pet. 10) between any particular gratuity provided by Sawyer and a specific official action that petitioner would not have taken "but for his receipt of the gratuity." *Ibid.* Petitioner contends that, to obtain a conviction for deprivation of honest services under the mail and wire fraud statutes, 18 U.S.C. 1341, 1343, 1346, the government must present evidence satisfying such a "quid pro quo requirement." Pet. 14.[4]

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[4] The issue in this case is distinct from the question presented in *United States* v. *Sun Diamond Growers*, cert. granted, No. 98-131 (Nov. 2, 1998). In that case, the Court granted certiorari to consider whether "the requirement in 18 U.S.C. 201(c)(1)(A) that a thing of value be given 'for or because of any official act' [is] satisfied by a showing that the giving of a thing of value was motivated by the recipient's official position." Neither the mail fraud nor the wire fraud statute, 18 U.S.C. 1341, 1343, contains similar

Petitioner does not cite—and we have not found—any decision in conflict with the court of appeals' decision below. Petitioner relies (Pet. 10-11) on cases in which public officials were convicted of mail or wire fraud based on evidence of specific actions taken by the defendants in exchange for bribes. Yet he cites no decision holding that Section 1346 requires such evidence of a "direct link * * * between a particular gratuity and resulting favorable action * * * [that] would not have been taken by the official but for his receipt of the gratuity." Pet. 10.

In any event, there is no basis for petitioner's claim (Pet. 16) that his conviction was based merely upon evidence of his "performance of official acts which by happenstance were favorable to Hancock but which were influenced by [his] view of the merits and not his receipt of the gratuities." As the court of appeals correctly held, the jury could infer that petitioner knew that the gratuities from Sawyer "would continue as long as he voted favorably to Hancock's interests," and that petitioner "intended to be influenced by the gratuities" (Pet. App. 19a), as demonstrated by the evidence that he "repeatedly acted on behalf of Hancock and the life insurance industry in his capacity as co-chair" of the Insurance Committee. *Id.* at 8a. The court of appeals also relied on several other aspects of the record at trial in holding that sufficient evidence supported the jury's verdict, including Sawyer's leaving his credit card behind at a conference to cover petitioner's meals and golf expenses, the fact that Sawyer covered petitioner's

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language. Indeed, 18 U.S.C. 1346 broadly defines a "scheme or artifice to defraud" for purposes of the mail and wire fraud statutes to include a "scheme or artifice to deprive another of the intangible right of honest services."

expenses but not vice versa, and the direct evidence of petitioner's statements to Smith concerning his efforts to persuade Sawyer to help him (or failing that, his son) to obtain a position with Hancock as a lobbyist.[5] *Id.* at 19a-24a. In short, as the court of appeals concluded (*id.* at 28a), the evidence was sufficient to permit the jury to infer a "connection between the gratuities and [petitioner's] official acts."

Petitioner disputes (Pet. 12-13) the court of appeals' further finding that his failure to disclose the gratuities received from Sawyer on his SFI forms, as required by state law, supported the jury's inference that petitioner intended to deprive the public of his honest services. Pet. App. 29a-32a. Petitioner claims that in that respect the court's decision is in conflict with the Eighth Circuit's rulings in *United States* v. *Rabbitt*, 583 F.2d 1014 (1978), cert. denied, 439 U.S. 1116 (1979), and *United States* v. *McNeive*, 536 F.2d 1245 (1976). Neither decision supports his claim.

In *Rabbitt*, the defendant was a state legislator who, in return for a fee, aided an architectural firm in obtaining state contracts. 583 F.2d at 1020. The defendant, however, "did not, in his official capacity, control the awarding of state contracts to architects," and the evidence did not demonstrate that he failed to carry out any of his official legislative duties or that he had an affirmative duty to disclose his interest. *Id.* at 1026. The court in *Rabbitt* acknowledged that "[t]he concept of fraud upon the public may clearly fall within the ambit of the mail fraud statute where dishonest conduct by a public official directly implicates the functions and

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[5] This evidence belies petitioner's claim (Pet. 14) that the court of appeals allowed the government to convict him based solely on a "scorecard" of his votes on various legislative proposals.

duties of *that official's* public office." *Id.* at 1024 (emphasis added). Similarly, in *McNeive*, a plumbing inspector's acceptance of gratuities for the performance of his duties was held not to violate the mail fraud statute because the defendant "exercise[d] no discretion in the issuance of plumbing permits," and he "was not derelict in any of his affirmative duties as Chief Plumbing Inspector." 536 F.2d at 1246, 1252. The court also relied on the absence of any attempt by the defendant to conceal his conduct as "tend[ing] to negate a finding that [he] entertained the requisite intent to defraud." *Id.* at 1252.

Here, by contrast, petitioner did exercise significant discretionary control over the legislative agenda for bills important to the life insurance industry. Accordingly, the court of appeals properly held that "[w]hen an official fails to disclose a personal interest *in a matter over which she has decision-making power*, the public is deprived of its right either to disinterested decision making itself or, as the case may be, to full disclosure as to the official's potential motivation behind an official act." Pet. App. 29a-30a (emphasis added) (quoting *Sawyer*, 85 F.3d at 724). Moreover, petitioner had a duty under state law to disclose the gratuities he received from Sawyer. His failure to do so, in accordance with *McNeive*, could support a finding of petitioner's intent to defraud. In short, petitioner's conviction would also have been affirmed under the rule of the Eighth Circuit.[6]

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[6] There is no basis for petitioner's contention (Pet. 13) that the court of appeals improperly "collapse[d]" two elements of his fraud offenses, the intent to deprive the public of his honest services and the intent to deceive required to make out a "scheme to defraud." As petitioner acknowledges, the court of appeals specifically stated (Pet. App. 12a n.6) that the two elements are distinct and must

b. Petitioner also renews his contention (Pet. 21-25) that the government failed to prove that the telephone call and mailing on which his fraud convictions were based furthered the execution of the fraud. That claim is limited to the particular facts of this case and was properly considered and rejected by the court of appeals.

Petitioner suggests (Pet. 23-24) that the fraudulent scheme could have been carried out in other ways that did not involve the charged telephone call or mailing. This Court has made clear, however, that the use of the mails or wires on which a mail fraud or wire fraud conviction is based "need not be an essential element of the scheme" to defraud; rather, "[i]t is sufficient for the mailing to be incident to an essential part of the scheme, or a step in [the] plot." *Schmuck* v. *United States*, 489 U.S. 705, 710-711 (1989) (citation and internal quotation marks omitted).

Petitioner also contends (Pet. 24) that the court of appeals' ruling conflicts with this Court's holdings in *Kann* v. *United States*, 323 U.S. 88 (1944); *Parr* v. *United States*, 363 U.S. 370 (1960); and *United States* v. *Maze*, 414 U.S. 395 (1974), because the charged mailing occurred only after petitioner received the gratuities from Sawyer. In *Kann*, *Parr*, and *Maze*, however, the fraudulent scheme had already "reached fruition" before the charged mailings took place, so that the mailings "involved little more than post-fraud accounting among the potential victims of the various schemes." *Schmuck*, 489 U.S. at 713, 714; see *id.* at 712-714

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each be satisfied in order to sustain a fraud conviction based on deprivation of honest services. Rather than "collapsing" the two elements, the court merely held that the same evidence supported the jury's findings with respect to both elements. See *id.* at 31a.

(distinguishing *Kann*, *Parr*, and *Maze*). In this case, as the court of appeals found (Pet. App. 36a), the mailing of Sawyer's credit card bill advanced an "ongoing scheme" in which Sawyer repeatedly used his credit card to pay for gratuities provided to petitioner. Thus, it is clear that the mailing was a "step in the plot" that furthered the execution of the scheme to defraud.[7]

Petitioner's claim (Pet. 21-22) that the mailing and telephone call were merely "pretexts to invoke federal jurisdiction" over violations of state law is equally unavailing. As this Court has explained, "[t]he fact that a scheme may violate state laws does not exclude it from the proscriptions of the federal mail fraud statute, for Congress 'may forbid any . . . [mailings] . . . in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not.'"

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[7] For the same reason, petitioner's reliance (Pet. 25 n.17) on *United States* v. *Evans*, 148 F.3d 477 (5th Cir. 1998), petition for cert. pending, No. 98-7223, is likewise misplaced. The defendant in that case was a parole officer in Fort Worth, Texas, who accepted bribes from a parolee she supervised in exchange for concealing his parole violations. *Id.* at 478-479. The defendant submitted false travel vouchers for required visits to the parolee's places of residence and employment that she in fact never made. *Id.* at 479. After the vouchers were approved by her supervisor, they were mailed to Austin, Texas, for processing. *Id.* at 482-483. The defendant was convicted of mail fraud based on the mailing of the travel vouchers. The court of appeals reversed her mail fraud convictions, explaining that "there was nobody in Austin who might have uncovered the scheme because [the defendant] did or did not submit travel vouchers," and, therefore, the scheme reached fruition once the defendant's supervisor approved the vouchers. *Id.* at 483. Because the charged mailings took place after that time, the court held, they did not further the scheme to defraud the State of its right to the defendant's honest services. *Ibid.* Here, in contrast, the credit card mailings took place during an ongoing course of conduct and assisted in perpetrating the scheme.

Parr, 363 U.S. at 389 (quoting *Badders* v. *United States*, 240 U.S. 391, 393 (1916)).

2. Petitioner also contends (Pet. 17-20) that the district court erred in instructing the jury regarding the requisite intent under the mail and wire fraud statutes for honest services fraud. He faults the court's instructions because he claims they permitted him to be convicted without proof of "the necessary quantum of unlawful intent in the mix." Pet. 18.

In *Sawyer*, the First Circuit held that, in honest services fraud cases concerning political corruption, a "jury needs to be told specifically that the defendant has not * * * committed honest services fraud * * * if his intent was limited to the cultivation of business or political friendship." 85 F.3d at 741. In accord with *Sawyer*, the district court instructed the jury that it could not find petitioner guilty "if his receipt of the expenditures was solely part of a routine cultivation of a business or political friendship rather than an intent on his part to be influenced in his official duties." Pet. App. 51a. The court also instructed the jury that it could find petitioner guilty on the fraud charges if there was "*both* the intent to cultivate a business and political relationship *and* the intent to be influenced in official legislative duties." *Ibid.* (emphasis added). As the court of appeals correctly observed, that instruction complied for all relevant purposes with the requirements set forth in *Sawyer*. *Id.* at 50a-51a. In his petition to this Court, petitioner fails to cite any court of appeals decision—in any circuit—that would require a district court to go beyond *Sawyer*'s requirements and give a "*de minimis*" intent instruction in such circumstances. Absent such disagreement among the lower courts, no further review is warranted by this Court.

In any event, the court of appeals' decision is correct. The court found that, "even if the instructions were not technically adequate because they lacked an explicit '*de minimus*' instruction, [petitioner] was not prejudiced thereby." Pet. App. 52a. As explained and recounted above, the evidence presented at trial more than adequately supported the jury's finding that petitioner possessed the intent to defraud. There is thus no basis for petitioner's claim that he accepted gratuities from Sawyer primarily for the lawful purposes of cultivating business and political friendship and only to a *de minimis* extent for the unlawful purpose of allowing his official legislative duties to be influenced thereby.[8]

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[8] Because sufficient evidence existed to support the jury's inference of petitioner's intent to defraud, he also cannot press his due process claim that the mail and wire fraud statutes are void for vagueness. Petitioner may not successfully attack Section 1346 as unconstitutionally vague by showing that hypothetical situations exist in which application of the statute would be ambiguous. He can prevail only by demonstrating that the statute failed to provide clear warning that his own conduct was proscribed. See *Chapman* v. *United States*, 500 U.S. 453, 467 (1991) ("First Amendment freedoms are not infringed * * * , so the vagueness claim must be evaluated as the statute is applied to the facts of this case."); *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975) ("[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand."); *Parker* v. *Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1998

(4)

Supreme Court, U.S.
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No. 98-462

IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1998

FRANCIS H. WOODWARD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY OF PETITIONER

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REASONS FOR GRANTING THE WRIT

I. IN URGING DENIAL OF THE PETITION THE GOVERNMENT MISCHARACTERIZES PETITIONER'S CHALLENGES

In an effort to minimize the importance of the issues raised by the Petition, the government's opposition attempts to recast petitioner's arguments largely as narrow challenges to the evidentiary sufficiency underlying his convictions. See Brief for the United States in Opposition (Opp.) at 10. This Reply addresses briefly certain of the misperceptions underlying the Opposition, and demonstrates further that the concerns raised by the petitioner implicate fundamental rights which are threatened by prosecutions of this type. In light of the proliferating number of honest services cases, it is critical that this Court for the first time determine the proper scope of 18 U.S.C. §1346, and ensure that prosecutions under that provision do not ensnare individuals who are engaged in non-criminal, albeit unattractive, conduct. Accordingly, and for the reasons cited in the Petition, as amplified herein, the Court should grant the Petition.

The government seeks in its opposition to relegate this appeal to a review of the sufficiency of the evidence, Opp. at 10-13. In doing so, it ignores the issues raised in the Petition relating to the proper scope and quantum of evidence necessary generally to secure a §1346 conviction, particularly with respect to the intent to defraud element. See Petition at 10.

In seeking to elude resolution of the broader questions presented, the government states that no decision has been cited or found which conflicts with the circuit court's decision, and that Woodward cites no case holding that §1346 requires evidence of a direct link between Woodward's receipt of gratuities and

resulting action favorable to the donor which Woodward would not have taken but for receipt of the gratuity. Opp. at 11.

The response to this assertion is two-fold. First, if the government were correct, it would mean that §1346 prosecutions would continue unabated in a standardless vacuum, without the benefit of the careful analysis and precise interpretation by this court which is necessary to prevent overly broad applications[1] and extensions of its provisions. In this scenario, the circuit court would have "decided an important question of federal law that has not been, but should be, settled by the court ..." Sup. Ct. Rule 10(c).

More fundamentally, however, as noted in the Petition at 7-8, the circuit court's decision built upon the expansion of the honest services fraud doctrine begun in U.S. v. Sawyer, 85 F.3d 713 (1st Cir. 1996). There the First Circuit recognized that honest services prosecutions of public officials has historically involved bribery where the official was paid for a particular decision or action or failure to disclose a conflict of interest resulting in personal gain. Despite this recognition, the court in Sawyer (and

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[1] The government amends that Woodward's void for vagueness challenge to §1346 cannot prevail, in the absence of First Amendment infringements, because the statute clearly applies to his own conduct. Opp. at 17 n. 3. For the reasons recited in the Petition, particularly with respect to the undefined nature of the intent to defraud element, Woodward rejects the notion that the statute clearly applies to his own conduct. Even if it did, however, his First Amendment freedom of association, with Sawyer and other lobbyists, is implicated. Thus, his void for vagueness challenge (and his related overbreadth argument) merit consideration by the Court.

subsequently in Woodward) broadened the scope of conduct subject to criminal liability.

This expansion represents a circuit conflict within the meaning of Sup. Ct. Rule 10(c), inasmuch as it clashes with the notion (implicit in the cadre of cases cited as Appendix D to the Petition), that conviction for honest services fraud requires either quid pro quo bribery or blatant conflict of interest. Moreover, the circuit court's decision constitutes a traditional circuit conflict when compared with the decision in U.S. v. Bloom, 149 F.3d 649 (7th Cir. 1998). In affirming the dismissal of an indictment premised upon alleged honest services deprivation by a Chicago alderman, the Seventh Circuit rejected the type of expansion effected by Sawyer and Woodward, stating:

> No one can be sure how far the intangible rights theory of criminal responsibility really extends because it is a judicial gloss on § 1341. Congress told the courts in § 1346 to go right on glossing the mail fraud and wire fraud statutes along these lines. Given the tradition (which verges on constitutional status) against common law federal crimes, and the rule of lenity that requires doubts be resolved against criminalizing conduct, it is best to limit the intangible rights approach to the scope it held when the Court decided (and Congress undid) McNally.

Bloom, 149 F.3d at 656. (emphasis added).[2]

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[2] To be sure, Bloom was decided in the context of considering the statute's application to a private fiduciary. Its pronouncements are no less instructive here, however, for they reflect a fundamental disagreement with the First Circuit's decisions in Sawyer and Woodward.

The circuit court's decision disregards this concept completely by effectuating a dramatic evolution in the area of honest services fraud prosecution. As such, it constitutes a circuit conflict worthy of review by this Court.[3]

In arguing that the necessary link between gratuities and official action has been proven in this case, the government parrots the circuit court's reasoning that the jury could infer that Woodward knew the gratuities would continue as long as he voted favorably to Hancock's interests. Opp. at 11. No circuit court has permitted a §1346 conviction to rest on such an amorphous link between receipt of the gratuity and action by the donee favorable to the donor, however.[4]

Illustrative of the difficulties posed by acceptance of such an argument are two major pieces of evidence overlooked in the Opposition. First, Sawyer continued paying for meals, golf, and entertainment for Woodward for fifteen months after he was deposed as House Chair of the Insurance Committee, which did not deal with insurance issues. Appendix to Brief of Defendant-

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[3] These issues are closely related to (and to some degree overlap with) those deemed worthy of this Court's review in U.S. v. Sun Diamond Growers, cert. granted No. 98-131. Despite the government's attempt to distance this case from Sun Diamond (Opp. at 10 n.4), the fact remains that the questions of criminal conduct versus merely unattractive "wining and dining" permeate both cases. Moreover, contrary to the government's assertion, the requirement that gratuities be given "for or because of any official act" was present in this prosecution through the application of Mass. G.L. c. 268A, §3.

[4] As noted in the Petition, several district courts (relying on Sawyer) have adopted such a view. See Petition at 9 n.6.

Appellant filed in First Circuit Court of Appeals (hereinafter "A____") at A272. During this period Sawyer paid for $1,340 in such shared entertainment, greater than the amount he paid the previous year when Woodward was potentially of great value to Hancock. If the theory is that Woodward received the gratuities knowing he had to act favorably to Hancock in order to continue receiving them, then why does he continue to receive them unabated after he no longer occupies a legislative position allowing him to help Hancock?

This theory of prosecution is also undermined by undisputed evidence that Woodward frequently acted contrary to Hancock's interests on matters of great concern to Hancock. Petition at 5. For example, just three weeks after Sawyer paid for $487.47 worth of food, golf, and entertainment for Woodward at a COIL conference, Woodward rebuffed Hancock on the bill which evidence at trial showed to be the single most important matter presented to the jury -- the bill that would have cost Hancock its lucrative $200 million state employee health insurance contract. If continued receipt of gratuities was contingent on Woodward's subservience to Hancock's interests, why was he able to oppose Hancock on this and many other critical pieces of legislation and still continue to receive the gratuities? The answer, we suggest, lies in the close (and also undisputed) personal friendship between Woodward and Sawyer, and their families.

It is not enough for the government to suggest that these were mere disputes of evidentiary sufficiency. Rather, they go to

the heart of the appropriate scope of §1346 prosecutions, and the proper standards to be employed in honest services cases.[5]

II. THE GOVERNMENT'S OPPOSITION IGNORES FUNDAMENTAL DEFICIENCIES CONTAINED IN THE "DUAL INTENT" JURY INSTRUCTION

The government's argument relating to the proper jury instruction on intent to defraud (Opp. at 16-17) is plagued by two principal deficiencies. First, the government argues that Woodward failed to cite any circuit court decision requiring a de minimus intent instruction of the type proffered by Woodward. Opp. at 16. Thus, the government contends, there is no disagreement among the lower courts warranting further review by the Court. Opp. at 16.

In fact, Woodward cited numerous circuit court cases in his brief to the First Circuit requiring such an instruction in other federal criminal cases. See, e.g., U.S. v. Wolf, 787 F.2d 1094, 1097-98 (7th Cir. 1986) (conviction reversed for plain error where "the judge failed to inform the jury of the difference between an incidental intent and ... a dominant or compelling or efficient cause"); U.S. v. Drury, 582 F.2d 1181, 1185 (8th Cir. 1978) (jury properly instructed that immoral purpose must be "one of the

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[5] Illustrative also of the standardless nature of this §1346 convictions is evidence of the type that a former staffer called Woodward "the most pro-life-insurance-industry chair" during the staffer's ten year tenure at the Committee. Opp. at 3. If Woodward was in fact the most pro-life insurance chair, did he become that way as a result of the gratuities, and/or in order to continue receiving them? Or, as evidence showed, was it because of his background as an insurance salesman and the naturally pro-business philosophy (A423) he possessed when first elected?

dominant purposes" of interstate travel in Mann Act prosecution); U.S. v. Tyler, 424 F.2d 510, 512 (10th Cir. 1970) (unlawful purpose must be "one of the efficient and compelling purposes in the mind of the accused" in order to support conviction under Mann Act). While Woodward believes these authorities serve as conflicting lower court precedents, to the extent these decisions are deemed not to be conflicting because they do not involve §1346, this represents once again the need for intervention by this Court to fill a jurisprudential gap in honest services cases. Sup. Ct. Rule 10(c).

Finally, the government contends that even if such an instruction were warranted, Woodward was not prejudiced by the district court's failure to give it. Opp. at 17. Because the evidence amply supported the jury's finding Woodward had the requisite intent to defraud, the government posits, there is no basis for his claim that he accepted gratuities from Sawyer primarily for a lawful purpose and only to a de minimus extent for an unlawful purpose. Id.

But the government's argument once again disregards the need for this Court to furnish guidance to district courts and circuit courts on the proper standards to govern §1346 cases. Such guidance is necessary to ensure that juries are instructed properly on the elements, and succeed in drawing the very fine line separating criminal from non-criminal conduct in this most difficult area. Only when instructed properly about where that line should be drawn -- and that it should be drawn on the acquittal side when unlawful intent is de minimus -- may a jury's verdict be a proper basis for conviction of a §1346 defendant. In light of the present, relatively uninformed state of the law in such cases, only a properly charged jury may make this determination, and no

assessment by court of appeal or by the government may substitute for such a verdict.

III. CONCLUSION

For the foregoing reasons, the Court should grant the Petition.

Respectfully submitted,

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